IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76- 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

— against —

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 3, 1976.

Opinions Below

The *per curiam* opinion of the United States Court of Appeals for the Eighth Circuit, sitting *en banc*, No. 76-1064 (8th Cir. Sept. 3, 1976), is not yet reported. The opinion previously rendered by a panel of that circuit is unofficially reported at 1976-1 Trade Cas. ¶ 60,892. Both are set forth in the appendix (App. A-1 and B-1), together with concurring and dissenting opinions. Also set forth in the appendix are

three unreported memoranda of the United States District Court for the District of Minnesota which concern, respectively, the cases of respondents the Philippines (App. C-1), India (App. D-1), and South Vietnam, the Philippines and Iran (App. E-1).

Jurisdiction

The judgment of a panel of the Court of Appeals for the Eighth Circuit was initially entered on May 19, 1976. A timely petition for rehearing *en banc* was granted on June 24, 1976, and, after such rehearing on August 17, 1976, the judgment of the Court of Appeals was entered on September 3, 1976. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1970).

Question Presented

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

Statutory Provisions Involved

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

> Section 4. [Suits by persons injured; amount of recovery]
>
> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
> 15 U.S.C. § 15.

> Section 1. [Words defined]
>
> • • •
>
> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.
> 15 U.S.C. § 12.

Statement of the Case

Respondents India, Iran, the Philippines and South Vietnam sued the petitioning drug companies for treble damages, alleging that the companies had violated sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize trade in tetracycline, a broad spectrum antibiotic patented in 1955.[1] The District Court's jurisdiction was invoked pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15.[2]

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1. The Court of Appeals has suggested that South Vietnam's case be either suspended or dismissed, in view of the fall of that government. *Pfizer Inc.* v. *Lord and The Republic of Vietnam*, 522 F.2d 612, 613 n.3 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976). The District Court has not yet acted upon petitioners' motion to dismiss made pursuant to that suggestion, and South Vietnam remains a respondent here, represented by the same counsel as respondent India. In addition to the cause of action described, India, but not the other respondents, has attempted to plead a claim under section 7 of the Clayton Act (15 U.S.C. § 18) and a common-law deceit action for single damages. India's right to pursue the latter claim is not challenged in this petition.

2. *Historical background:* These cases form a part of the extensive damage litigation waged against petitioners by scores of private parties, all fifty States of the Union, and the United States Government. For the early FTC proceeding, see *In re American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded sub nom. American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), *In re American Cyanamid Co.*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920 (1968). For the criminal antitrust case, see *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32 (conviction reversed), *rehearing en banc denied*, 437 F.2d

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Petitioners moved to dismiss the claims of the respondent foreign countries on the ground that they are not among the "persons" on whom section 4 of the Clayton Act confers a cause of action for treble damages. The District Court for the District of Minnesota refused to dismiss, holding that India, Iran, the Philippines and South Vietnam *are* persons entitled to sue for treble damages.[3] Thereafter, the District Court held that there was "substantial ground for difference of opinion" as to the correctness of its decision; that the decision concerned "a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery" (App. D-2); and that resolution of the issue on interlocutory appeal pursuant to 28 U.S.C. § 1292(b) might "materially advance the ultimate termination of this litigation." App. D-2, E-5.

The Court of Appeals for the Eighth Circuit, which had earlier ruled that the propriety of the foreign government claims could not be challenged on mandamus (*see Pfizer Inc.* v. *Lord and The Republic of Vietnam*, 522 F.2d 612, 614-15 (8th Cir. 1975)), agreed to hear the interlocutory appeal. On May 19, 1976 a panel of that circuit affirmed the judgment of the District Court.

(fn. cont. from preceding page)
957 (2d Cir. 1970), *aff'd upon equal division of the court*, 404 U.S. 548 (1972), *acquittal on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973). See also, *e.g.*, *State of West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *Hartford Hospital* v. *Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971); and *State of North Carolina* v. *Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 97 S.Ct. 183 (1976). In addition to the claims of foreign countries for treble damages, a claim for single damages by the United States remains outstanding. Most of the other claims have been disposed of by settlement or adjudication.

3. The District Court did not rule on motions to dismiss the claims of the Federal Republic of Germany and Colombia, the only other foreign countries that have claims outstanding in this litigation. Claims by South Korea, Spain and Kuwait have been withdrawn. For a reported opinion in the Kuwait case, see *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D.N.Y. 1971).

The Decision of the Original Panel

The panel noted that this is a case of "first impression" (App. B-2), and stated that "whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act." App. B-3. It observed that "[t]wo decisions of the United States Supreme Court offer guidance. . . ." App. B-4. In one, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States was not a "person".[4] In the other case, *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held that a State of the United States *was* a "person" entitled to sue for treble damages. Comparing the two cases, the panel acknowledged that "*Cooper* does contain passages which on the surface lend support to appellants' argument" (App. B-5) but nonetheless found *Georgia* v. *Evans* controlling as to the right of a foreign country to sue. App. B-7.

One member of the panel, the Honorable Donald R. Ross, concurred "because I think the result is mandated by *Georgia* v. *Evans*," but added that, in his view,

> Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.
>
> App. B-7—B-8.

The Decision En Banc

Petition for rehearing *en banc* was granted and after such rehearing before the eight judges of the circuit in regular

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4. Thereafter, Congress gave the United States a right to sue for *single* damages, but withheld the treble-damage remedy. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified as 15 U.S.C. § 15a).

active service (including all three members of the original panel) six judges adhered to the decision of the original panel. Three of the six (Chief Judge Gibson, Judge Webster and Judge Ross himself) also joined in the original concurrence of Judge Ross. App. A-1.

Two judges (Bright and Henley, JJ.) dissented:

> It seems anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." [312 U.S.] at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act.
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> • • •
>
> . . . States and municipalities of these United States are not analogous to foreign sovereigns. Certainly Congress would face different or additional policy questions in deciding whether foreign sovereigns should be authorized to sue a domestic corporation for treble damages.

App. A-2—A-3.

REASONS FOR GRANTING THE WRIT

Summary

The Court has previously granted certiorari to decide whether the United States and States of the Union were "persons" entitled to sue for treble damages. In both cases the petition was granted because of the importance of the question presented. *See United States* v. *Cooper Corp.*, 312 U.S. at 603; *Georgia* v. *Evans*, 316 U.S. at 161. The question now raised, whether foreign countries may sue, is the last of these related questions. It is of equal importance and has not been resolved by the Court's previous decisions.

The Eighth Circuit's decision here in issue establishes a novel and extremely important cause of action under the antitrust laws, in apparent conflict with *United States* v. *Cooper Corp.*, and despite the conclusion by five of the eight judges sitting *en banc* that Congress had no "legislative intent whatsoever" as to creation of a treble-damage right for foreign governments. App. B-8; A-2. Three of the five nonetheless felt compelled to concur in the majority's decision to establish such a right because, as they said, "the result is mandated by *Georgia* v. *Evans*." App. B-7. It is respectfully submitted that the concurring judges disregarded the essential principle of separation of powers as well as controlling precedent of this Court, for both *Georgia* v. *Evans* and *United States* v. *Cooper Corp.* confirm that the cause of action for treble damages may be extended to political entities only if such extension properly reflects the intent of Congress. 312 U.S. at 605; 316 U.S. at 161. Mechanical application of a highly distinguishable precedent did not fulfill the task of decision, which all members of the majority below agreed was "to determine the intent of Congress in passing the Act." App. B-3.

The Court of Appeals erred in failing to recognize that, while considerations of federalism impelled Congress to accord the treble-damage right to States of the Union, those considerations are not applicable to foreign countries. The States had surrendered to Congress their authority to regulate interstate and foreign commerce and Congress had assumed a corresponding obligation to regulate such commerce for their common benefit. Congress has assumed no such protective or suzerain role with respect to foreign governments. They continue to possess sovereign powers to regulate commerce in accord with their own economic philosophies.

Since the Court of Appeals declined to consider the applicable reasons of policy which may have moved Congress to withhold the treble-damage remedy from foreign governments, and since it concluded, in effect, that it must apply a precedent of this Court in a manner which does not reflect the intent of Congress, this Court should exercise its supervisory jurisdiction. It is for this Court to say whether its 1942 decision that the State of Georgia could maintain a treble-damage action does indeed compel the conclusion that by inadvertence, without legislative intent, Congress conferred on foreign countries a treble-damage right that it chose to withhold from the United States. *See* 15 U.S.C. § 15a (1970).

The question now presented should be resolved without delay because of its importance in the administration of the federal antitrust laws and because it affects the relationships between American business and all of the world's governments, which participate in international trade on a massive scale never imagined when Congress enacted the antitrust laws.

I.

The Decision of the Court of Appeals Raises an Important Question of Federal Law which Should be Settled by this Court Without Delay.

In both *United States* v. *Cooper Corp.* and *Georgia* v. *Evans* the petition for certiorari was granted because of the importance of the question presented. *See* 312 U.S. at 603; 316 U.S. at 161. The question now raised—the last of these related questions—is of equal importance.

The Eighth Circuit's grant of rehearing *en banc* is an indication of the "exceptional importance" of these cases. Fed. R. App. P. 35. Indeed, the concurring judges described the question as "extremely important." App. B-8. Although the Department of Justice has opposed our position on the merits in the lower courts, it, too, has acknowledged that these cases present "important economic and foreign-policy issues" and pose "an important question involving the interpretation and administration of the federal antitrust laws." Motion of the United States for Leave to Participate in Oral Argument as Amicus Curiae at the En Banc Rehearing, p. 2, No. 76-1064 (8th Cir. Sept. 3, 1976).

The question will not be altered or illuminated by trial. Both *United States* v. *Cooper Corp.* and *Georgia* v. *Evans* were decided after dismissal on the pleadings, without benefit of a trial record. Decision of the question, if in favor of petitioners, will substantially terminate the litigation of these cases and eliminate the need for lengthy trials.[5] Recent practice of this Court accords with the spirit of the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), and confirms that certiorari may properly be

5. In the related case in which the United States Government seeks single damages, a mistrial was declared on August 16, 1976 after some *21 months* of intermittent trial. *United States* v. *Pfizer Inc.*, No. 4-71 Civ. 403 (D. Minn.).

granted to decide important questions whose resolution might eliminate the need for extended discovery and trial, particularly of antitrust claims. See *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425 U.S. 1, 6 (1976); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 192-93 (1974); *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 256-57 (1972).

Denial of certiorari in these cases would very likely result in the litigation of other antitrust claims by foreign governments, which would necessarily proceed in the lower courts for a number of years prior to entry of any final judgment. So long as the Eighth Circuit's decision remains unreviewed by this Court, American companies abroad will be uncertain what measures they may safely take to resist foreign confiscations, compulsory amendments to concession agreements, and other impositions which have often occurred in the past and may occur again at any time.

A recent case in the Second Circuit illustrates one aspect of the problem. *Long Island Lighting Co.* v. *Standard Oil Co. of Cal.*, 390 F. Supp. 1172 (S.D.N.Y.), *aff'd in part and rev'd in part*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976). After Libya's "Revolutionary Command Council" seized certain oil concessions from American grantees, the Americans declined to repurchase their own oil from the Libyan government, fearing that if they yielded to Libya, Saudi Arabia, where they held even more important oil properties, would carry out a similar confiscation. The Second Circuit described their conduct as "a group boycott aimed primarily at Libya and secondarily at Saudi Arabia" (521 F.2d at 1274), but held that plaintiff East Coast utilities, which suffered a resulting shortage of Libyan oil, had no right to complain of an antitrust violation since they were not in the "target area" of the boycott. If the Eighth Circuit's decision in the instant cases were allowed to stand, however, a foreign government might be free not only to seize the property of American

companies but to use American courts to punish any combined resistance. Indeed, if American companies were successful in resisting a takeover, they might find themselves liable to the foreign country for antitrust damages in excess of the value of their own threatened assets. In effect, the Eighth Circuit's decision could eliminate joint resistance or joint bargaining by American business as an instrument for the defense of our commercial interests.[6]

Still other harmful consequences appear likely. Some foreign countries which have already reaped vast profits through trade combinations such as OPEC would be only too happy to let American courts award them further chunks of the American economy as "damages." Multiple damage claims by such governments could transform the capital inflow which American exports have achieved in some fields, such as aircraft, computers and electronic equipment, into massive losses for American investors and our balance of payments, and might even result in transfers of ownership or control to foreign states. The possibility of such consequences would have been repugnant to Congress, which recognized the punitive nature of the treble-damage action[7] and intended it as an ancillary weapon, not the sole method of enforcement. We do not suggest that violation of the antitrust laws be encouraged or ignored, but that the national interest will best be served if the enforcement of those laws is left to the federal government and to the "persons" Congress had in mind when it established the private cause of action.

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6. In the past the Executive Department has sanctioned and probably encouraged joint bargaining by American oil companies with various Arab nations in order to resist threats of nationalization or demands for increased revenue from oil concessions. *See Hearings on Multinational Petroleum Companies and Foreign Policy Before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess., pt. 9, at 46-49 (1974) (Statement of Thomas E. Kauper, Assistant Attorney General of the United States, Antitrust Div., Dep't of Justice).

7. *See, e.g.*, 21 CONG. REC. 3146 (1890) (remarks of Senator Hoar).

II.

Congress Did Not Intend to Confer the Cause of Action for Treble Damages Upon Foreign Governments.

A. In 1890 and in 1914 It Was Clear Under Controlling Statute And Supreme Court Precedent That the Term "Person" Did Not Extend to Foreign Governments Without Express Definition.

In 1871 Congress enacted a general interpretive statute in which, as Mr. Justice Frankfurter stated, "Congress supplies its own dictionary."[8] As enacted, the statute provided that in federal legislation "the word 'person' may extend and be applied to bodies politic and corporate . . . ." Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. In 1872, however, the commissioners charged with statutory revision[9] reported to Congress that the reference to "bodies politic" was "ambiguous" and "goes further than is convenient," since it might be deemed to include unincorporated government entities and thus "requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded." Therefore the revisers recommended that Congress omit the reference to "bodies politic" so as to ensure that "person," when used in subsequent legislation, would not be extended to such governments without special definition. *See* Revisers' Note, I *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872). Congress adopted the recommendation. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092 (Revised Statutes enacted into positive law). Thereafter the definition of "person" which appeared in Title I, Chapter I, Section 1 of the Revised Statutes, and with which the drafters of the Sherman Act were undoubtedly familiar, provided simply that "the word 'person' may apply and be extended to partnerships and corporations." *Cf.* 1 U.S.C. § 1 (present version). Contemporary annotations pointed out that the provision as drafted was intended to exclude "foreign governments." *See* I *Notes on the Revised Statutes of the United States, 1874-1889* at 1 (J. Gould & G. Tucker eds. 1889). In choosing similar language for section 8 of the Sherman Act (Act of July 2, 1890, ch. 647, § 8, 26 Stat. 210; 15 U.S.C. § 7), the authors of that law manifested a similar purpose to exclude foreign governments. The authors of the relevant sections of the Clayton Act adopted the same language, taken from the Sherman Act, and manifested the same purpose.[10]

A decision of this Court gave the authors of the Sherman Act further reason to believe that in using the word "person" they were not conferring a cause of action upon foreign governments. In *United States* v. *Fox*, 94 U.S. 315 (1876), the Court unanimously approved, as a general rule of construction, the same rule which Congress had adopted for the interpretation of federal statutes in 1874:

> The term 'person' as . . . used [in the New York statute governing the devise of real property] applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. *It would require an express definition to that effect to give it a sense thus extended.*
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> 94 U.S. at 321 [emphasis added].

8. F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

9. Appointed pursuant to Act of June 27, 1866, ch. 140, 14 Stat. 74.

10. Section 8 of the Sherman Act is substantially identical to the relevant portion of section 1 of the Clayton Act, here in issue. *Compare* 15 U.S.C. § 7 (Sherman Act § 8) *with* 15 U.S.C. § 12 (Clayton Act § 1). Also substantially identical are section 4 of the Clayton Act, here in issue, and section 7 of the Sherman Act. 15 U.S.C. § 15 was regarded as the codification of both sections. *See Georgia* v. *Evans*, 316 U.S. at 160; W. Thornton, COMBINATIONS IN RESTRAINT OF TRADE 806 (1928 ed.). In 1955 Sherman Act, section 7 was repealed as duplicative of Clayton Act, section 4. Act of Jul. 7, 1955, ch. 283, § 3, 69 Stat. 283. *See* S. REP. No. 619, 84th Cong., 2d Sess. 2 (1955).

In other words, so far as legislation was concerned, "person," unless extended by special definition, did not include independent powers beyond the authority of the enacting state. *See In re Fox*, 52 N.Y. 530, 535 (1873), *aff'd sub nom. United States* v. *Fox*, 94 U.S. 315 (1876).[11]

The authors of the Sherman Act had a wide acquaintance with the precedents of this Court, scores of which were cited in the antitrust debates of 1889-90.[12] We are told that, in preparing its definitive draft of the law, the Senate Judiciary Committee sought to use "terms which had a perfectly settled meaning in jurisprudence."[13] In view of the controlling statute and precedent of this Court, they were entitled to conclude that "person" was such a term and that it did not include foreign sovereigns unless extended by special definition. They chose to extend the term to include all corporations and associations, regardless of their place of organization, but not foreign sovereigns.[14] Their choice merits continued respect today.[15]

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11. It may also have been the *Fox* case which prompted the drafters of the Sherman Act, section 8 to particularize that "person" included all corporations and associations whether organized under the laws of "the United States, . . . the Territories, . . . any State, or . . . any foreign country," since this Court had observed in that case that a reference to "corporations" without more might include only those corporations organized under the laws of the enacting state. *See* 94 U.S. at 321.

12. *See* BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS, S. Doc. No. 147, 57th Cong., 2d Sess. ix-xi (1903).

13. F. E. Leupp, *The Father of the Anti-Trust Law*, THE OUTLOOK, September 30, 1911, at 273.

14. Under the usual rule of construction, "expressio unius est exclusio alterius," section 8's careful enumeration of the entities, corporations and associations, which are to be deemed persons implies that other entities are excluded. *United States* v. *Cooper Corp.*, 312 U.S. at 607; *United States* v. *United Mine Workers*, 330 U.S. 258, 273 (1947) ("The absence of any comparable provision extending the term [person] to sovereign governments implies that Congress did not desire the term to extend to them").

15. Further evidence of this choice is found in the fact that when Senator Sherman and the Senate Finance Committee proposed at one stage to base the enactment of 1890 upon the federal diversity juris-

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B. Considerations of Federalism Which Impelled This Court to Extend the Treble Damage Remedy to States of the Union Are Not Applicable to Foreign Countries.

When this Court considered *Georgia* v. *Evans* it had long been established that cities could sue for treble damages, since they were not sovereigns but "municipal corporation[s]" formed under the laws of the several States. *See City of Atlanta* v. *Chattanooga Foundry & Pipe Co.*, 101 Fed. 900, 901 (E.D. Tenn. 1900), *rev'd on other grounds*, 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906). The State of Georgia argued that "if the word 'person' as used in the statute excludes the sovereign, the State may yet maintain an action," because it "has effectively divested itself of its sovereignty with reference to . . . interstate commerce . . . and is relegated to the status of a private individual." Brief for Appellant at 37, *Georgia* v. *Evans*, 316 U.S. 159 (1942).

Georgia's argument recalled that made by Senator Sherman himself in 1890, when he urged adoption of a federal antitrust law on the ground that state laws were ineffective to control inter-state conspiracies. He described New York's attack upon the sugar trust and noted that although a New York court had been able to dissolve one New York corporation, "the combination was between that company and sixteen others . . . . In the courts of the United States all of

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diction, they pointedly omitted that portion of the diversity jurisdiction which allows suit by or against foreign states. The Act was to apply only to "citizens or corporations" of different States, of the United States and foreign countries, or of foreign countries. *See, e.g.*, 21 CONG. REC. 2455, 2464 (1890). After the language containing the diversity requirement was eliminated, the bill referred to all "citizens or corporations," and Senator Sherman obtained the Senate's consent to substitute the word "persons" for "citizens," describing the change as a mere "verbal amendment." *Id.* 2639. Thus, as approved by the Senate prior to final referral to the Judiciary Committee, the bill forbade combinations between "persons or corporations." "Persons", as the verbal equivalent of citizens, meant individuals, regardless of their citizenship.

them might have been parties, but as a matter of course, the supreme court of New York could not extend its jurisdiction beyond the limits of its own territory." 21 Cong. Rec. 2459 (1890).

In deciding *Georgia* v. *Evans,* this Court responded to the problem created by the States' surrender to Congress of their power to regulate interstate commerce and concluded that, in view of the "legislative environment," Congress intended to confer the cause of action for treble damages upon the States. 316 U.S. at 161. It appears that the purpose of the 1874 amendment to the statutory definition of "person" was not brought to the Court's attention.

The Court recognized that Congress wished to exercise the commerce power in the interest of the States, and observed that "[i]f the State is not a 'person' within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act . . . ." 316 U.S. at 162-63. The Court did not hold that a state or "state-like" entity was necessarily a "person," but rather, quoting *United States* v. *Cooper Corp.,* that there was " 'no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent . . . .' " 316 U.S. at 161. All are "factors" to be weighed. *Id.*

In the present cases the Court of Appeals declined to weigh these factors and instead assigned to the word "person" a broad, perfunctory meaning. In so doing it disregarded controlling precedent of this Court which holds that "person" must be limited to reflect the intent of Congress. *City of Kenosha* v. *Bruno,* 412 U.S. 507, 512-13 (1973); *Monroe* v. *Pape,* 365 U.S. 167, 191 & n.50 (1961); *Georgia* v. *Evans,* 316 U.S. 159, 161 (1942); *United States* v. *Cooper Corp.,* 312 U.S. 600, 604-05 (1941); *United States* v. *Palmer,* 16 U.S. (3 Wheat.) 610 (1818).

The Court of Appeals stated that if foreign governments are not "persons," then the antitrust laws afford them no

redress (App. B-6—B-7), and apparently found this truism dispositive. It erred in assuming that Congress intended to protect foreign governments in the same manner that it protects the States. It overlooked the fact that, unlike the States, foreign countries retain plenary powers to protect themselves.[16]

There is no need to ascribe to Congress a "discriminatory" purpose in order to conclude that it accorded treble-damage rights to the States but not to foreign countries. It is part of Congress' task to protect the States. The comity it extends to foreign countries entails a far different obligation.[17]

C. The Judicial Branch Should Not Extend Section 4 of the Clayton Act for the Benefit of Foreign Countries Without A Clear Expression of Congressional Intent.

Despite long experience with the Sherman and Clayton Acts, it appears that the cases against petitioners are the first to be reported in which foreign countries have asserted

16. In an appropriate case, foreign governments may employ the diplomatic channel to request that the Executive Branch commence an injunctive action under our antitrust laws. Unlike States (*see, e.g., City Bank Farmers Trust Co.* v. *Schnader,* 291 U.S. 24, 29 (1934)), foreign governments may also invoke the diversity jurisdiction of the federal district courts, and may sue there under the principles of their own law, if its application is not contrary to the policy of the forum. Or they may sue wrongdoers in their own courts. Of course, foreign countries may enact their own antitrust legislation as respondents India and the Philippines have done. *See* India Monopolies and Restrictive Trade Practices Act, 1969, 14 India A.I.R. Manual 657 (1972); Philippines Rev. Penal Code art. 186 (1972).

17. Congress recognized the difference only this year when it established a right of States to sue for antitrust violations as *parens patriae* on behalf of their citizens, but did not extend the right to foreign countries. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. III (Sept. 30, 1976). *Cf. United States* v. *Concentrated Phosphate Export Ass'n,* 393 U.S. 199, 208 (1968) (Congressional antitrust policy as expressed in Webb-Pomerene Act, 40 Stat. 517; 15 U.S.C. §§ 61-65 (1970)).

a right to treble damages. "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). *Accord, United States* v. *Cooper Corp.*, 312 U.S. 600, 614 (1941). *See also Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

The general rule applied by this Court is that the Judicial Branch should leave to Congress the decision whether to provide particular damage remedies. *E.g., Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972); *United States* v. *Gilman*, 347 U.S. 507, 511-13 (1954); *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 314-17 (1947). *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 206-11 (1976). The observation in *United States* v. *Cooper Corp.* that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made" (312 U.S. at 605) is particularly applicable to the present situation because of the conclusion by five of the eight judges who considered these cases in the Court of Appeals that Congress had no "legislative intent whatsoever" as to creation of a treble-damage right for foreign governments. App. A-2, B-8. The Judiciary should not create a cause of action that Congress did not intend.

The admonition as to judicial restraint is especially appropriate today when many of the world's foreign countries are arrayed in trade combinations which conflict with the philosophy of the antitrust laws, but which our government has been substantially powerless to prevent. If the decision is made to accord such countries the right here in issue, it should be made by Congress.

CONCLUSION

The question presented in these cases is not whether foreign countries are juristic persons which may sue or be sued in our courts. The question is whether they were "persons" within the purpose and contemplation of Congress, upon whom Congress conferred a statutory right to treble damages on enactment of the Sherman and Clayton Laws. The Court has previously granted certiorari to decide the same question with respect to the United States and States of the Union. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941); *Georgia* v. *Evans*, 316 U.S. 159 (1942). It is respectfully urged that the importance of the question now raised, the need to settle the question without delay, and the duty to ensure that the Judiciary interpret the antitrust laws in accordance with the intent of Congress (*see* SUP. CT. R. 19 (1)(b)), all call for the grant of this petition for certiorari.

Respectfully submitted,

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December 1, 1976

APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-1064

PFIZER, INC., *et al.*,

Appellants,

v.

THE GOVERNMENT OF INDIA, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA.

SUBMITTED: AUGUST 17, 1976
FILED: SEPTEMBER 3, 1976

Before GIBSON, Chief Judge, LAY, HEANEY, BRIGHT, ROSS, STEPHENSON, WEBSTER and HENLEY, Circuit Judges, *en banc.*

PER CURIAM.

The original panel opinion filed on May 19, 1976, is adopted by the court. Chief Judge Gibson and Judge Webster also join in Judge Ross' concurring opinion.

The judgment of the district court is ordered affirmed.

BRIGHT and HENLEY, Circuit Judges, dissenting:

This case presents the question of whether foreign sovereigns are "persons" entitled to sue for treble damages under

§4 of the Clayton Act (15 U.S.C. §15). As the majority opinion acknowledges, two Supreme Court decisions provide the only instances in which similar questions have been considered. In *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Court ruled that the United States was not a "person" entitled to sue for treble damages under the antitrust laws. In *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held that Congress did intend the states to be such "persons." We believe that *Cooper* is the proper guide for decision of the instant case.

It seems anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *Id.* at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act.

Congress made no express provision for foreign governments, nor is there any evidence that Congress considered granting a foreign government the right to sue for treble damages. Judge Ross in a separate concurrence (joined by Chief Judge Gibson and Judge Webster) appropriately observed that Congress "gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." [Slip op. at 8.] The *Cooper* Court stated:

> [I]t is not our function to engraft on a statute additions which we think the legislature logically might or should have made. [312 U.S. 605.]

The judiciary ought not to add foreign governments to the "person" class without a clear Congressional intent to do so.

The majority opinion reasons that because *Georgia v. Evans, supra,* authorizes a state of the United States to bring treble damage suits as a "person" under the Clayton Act, that, therefore, foreign sovereigns must also be granted the right to sue. We do not agree with the logic of such conclusion.

The *Evans* Court reasoned that Congress intended that a State be deemed a person authorized to sue for treble damages for otherwise it would have no redress for antitrust violations; that no reason exists for believing that Congress wanted to deny a State this remedy, and, finally, that because it already had been held that municipalities, which are subdivisions of States, were entitled to such remedy, that such remedy should be afforded the State. The majority finds "the same reasoning [is] applicable to a foreign sovereign" [Slip op. at 7.], we cannot agree. States and municipalities of these United States are not analogous to foreign sovereigns. Certainly Congress would face different or additional policy questions in deciding whether foreign sovereigns should be authorized to sue a domestic corportion for treble damages.

The majority has concluded that in light of *Evans,* "Congress intended other bodies politic, such as a foreign government, to enjoy the same right." [Slip op. at 7.] If this conclusion rests upon Congressional intent, the analysis is tenuous at best. If this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term "person," the definition of "person" should now be even further expanded, then the majority has adopted a questionable principle of statutory construction.

The arguments and briefs of the parties demonstrate that the issue of granting an antitrust remedy to foreign governments presents complex matters relating to international trade and foreign policy. We note that many foreign countries foster monopolistic practices as a matter of government policy. For example, Iran, one of the plain-

tiffs-appellees, belongs to the cartel of the Organization of Petroleum Exporting Countries (OPEC). Granting such sovereigns the right to sue American companies for treble damages will not diminish their own restraint of trade. Nevertheless, plaintiffs-appellees, and the United States, as *amicus curiae*, argue that granting foreign sovereigns the right to sue under the antitrust laws will assure effective enforcement of those laws. Furthermore, the United States declares that granting such a right will "assure optimum financial efficiency in the allocation of American dollars sent abroad." [Amicus br. at 5.] Whether these and other policy considerations will be best implemented by authorizing a foreign government to recover treble damages for antitrust violations is a determination which Congress should make.

The Supreme Court has cautioned restraint on the part of the judiciary in expanding the scope of the Clayton Act beyond statutory language without a clear expression of Congressional purpose. *See, e.g., Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 202 (1974); *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 264 (1972). We would heed that caution and reverse the district court.

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Appendix B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 76-1064

PFIZER, INC., *et al.*,

Appellants,

v.

THE GOVERNMENT OF INDIA, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

SUBMITTED: MARCH 11, 1976

FILED: MAY 19, 1976

Before LAY, ROSS and STEPHENSON, Circuit Judges.

LAY, *Circuit Judge.*

This interlocutory appeal is brought under 28 U.S.C. § 1292(b) by six major pharmaceutical firms, defendants in the district court in antitrust treble damage suits brought by the governments of several foreign countries.[1] The sole question certified for appeal is whether the district court was correct in holding that foreign governments are

1. The appellant pharmaceutical firms are Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation and The Upjohn Company.

The governments involved in this appeal are the Government of India, the Imperial Government of Iran, the Republic of the

"persons" entitled to sue for treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15. We affirm the judgment of the district court.

All parties agree this is a case of first impression.[2] Civil suits by foreign sovereigns have long been recognized in federal courts. *See The Sapphire*, 78 U.S. 164 (1870).[3] The Constitution of the United States extends the jurisdiction of the federal courts "to all Cases . . . [and] Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const. Art. III, § 2.

Philippines and the Republic of Vietnam (the former government of South Vietnam). In a prior opinion, this court refused to pass upon the continued viability of suit by the Republic of Vietnam. This question should be determined by the district court on remand. *See Pfizer, Inc.* v. *Lord*, 522 F.2d 612, 613 n. 3 (8th Cir. 1975).

We are informed that the governments of West Germany, Spain, Columbia [sic.] and South Korea have filed similar suits. The latter three suits were filed in the District of Columbia.

2. This issue was presented to this court once before by the same parties. At that time, the district court had not certified the question for interlocutory appeal under 28 U.S.C. § 1292(b). We held under those circumstances that an appeal was premature and that the order of the district court was not subject to review on a petition for a writ of mandamus. *Pfizer, Inc.* v. *Lord*, 522 F.2d 612 (8th Cir. 1975).

On remand, the district court granted § 1292(b) certification on whether foreign governments are "persons" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15.

3. In *The Sapphire*, Mr. Justice Bradley wrote for the Court:

> A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts. To deny him this privilege would manifest a want of comity and friendly feeling. Such a suit was sustained in behalf of the King of Spain in the third circuit by Justice Washington and Judge Peters in 1810. . . . Our own government has largely availed itself of the like privilege to bring suits in the English courts in cases growing out of our late civil war. Twelve or more of such suits are enumerated in the brief of the appellees, brought within the last five years in the English law, chancery, and admiralty courts. There are numerous cases in the English reports in which suits of foreign sovereigns have been sustained, though it is held that a sovereign cannot be forced into court by suit.

78 U.S. at 167-68.

It is agreed, however, that whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act.[4]

Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15.

Section 1 of the Act provides the following definition:

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

15 U.S.C. § 12.

The Supreme Court has stated, with reference to the antitrust laws,

> Whether the word "person" or "corporation" includes a State or the United States depends on its legisla-

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4. All parties, and the United States (who appears as *amicus curiae* to urge that foreign sovereigns are entitled to sue) raise many public policy arguments concerning the potential effects on foreign trade, foreign relations, and the economy of a ruling either way. It is urged by appellees that dire consequences will flow from a determination that a foreign government is not entitled to sue for treble damages under United States antitrust laws. These are legislative arguments, and as such are not germane to the proper exercise of judicial power, except as they shed light on the purpose and intent of Congress in passing the legislation before us.

> tive environment. . . . The *Cooper* case recognized that "*there is no hard and fast rule of exclusion.* The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 312 U.S. at 604-05.
> *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942) (emphasis added).

Two decisions of the United States Supreme Court offer guidance, but beyond these we find little relevant help in construing the statute. In *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Court decided that the United States government was not within the definition of "person" under the antitrust laws. One year later, however, in *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held that Congress intended a state of the United States to be a "person" entitled to sue for treble damages.[5]

The appellant pharmaceutical firms rely on *Cooper* in urging that foreign governments are not entitled to sue. In *Cooper*, the Supreme Court found that Congress' provision of certain antitrust sanctions and remedies available only to the United States indicated an intent to exclude the United States government from the class of persons entitled to sue for treble damages. The Court pointed out in *Cooper* that only the United States could institute criminal prosecutions, request injunctions to restrain violations, and

5. Both *Cooper* and *Evans* dealt with former § 7 of the Sherman Act, which was repealed in 1955. That section provided:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

seize goods owned under contracts which violated the antitrust laws.[6]

Cooper does contain passages which on the surface lend support to appellants' argument. The Court observed:

> Since, in common usage, the term "person" does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it.
> 312 U.S. at 604.

The Court further stated:

> The more natural inference, we think, is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations.
> *Id.* at 606.

Finally, the Court concluded:

> The very fact, however, that this sweeping inclusion of various entities was thought important to preclude any narrow interpretation emphasizes the fact that if the United States was intended to be included Congress would have so provided expressly.
> *Id.* at 607.

However, these observations must be read in light of the subsequent decision of *Georgia* v. *Evans, supra*, which recognized that the word "person", as used in the antitrust

6. In *Cooper*, the Court listed the following provisions:

> Sections 1, 2, and 3 impose criminal sanctions for violations of the acts denounced in those sections respectively. Section 4 gives jurisdiction to the federal courts of proceedings by the Government to restrain violations of the Act and imposes upon United States Attorneys the duty to institute equity proceedings to that end. Section 5 regulates service in such suits. Section 6 authorizes seizure, in the course of interstate transportation, of goods owned under any contract or pursuant to any conspiracy made illegal by the statute.
> 312 U.S. at 607.

In 1955, Congress amended the Clayton Act to provide the United States government the right to sue for actual damages. *See* 15 U.S.C. § 15(a).

laws, did include the governments of domestic states. In *Evans*, Mr. Justice Frankfurter pointed out that *Cooper* held only that, due to the alternative antitrust weapons granted to the United States government, that government was not entitled to sue for treble damages as well. However, he emphasized that *Cooper* did not hold "that the word 'person' abstractly considered, could not include a governmental body." 316 U.S. at 161. Thus, in *Evans*, the Court distinguished *Cooper* by focusing on the distinctions between the array of remedies and sanctions given to the United States government and the single remedy of a treble damage suit provided to others who might be injured due to antitrust violations.

In *Evans* the Court said:

> The considerations which led to this construction [in *Cooper*] are entirely lacking here. The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. . . . If the State is not a "person" within § 8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.
>
> The question now before us, therefore, is whether no remedy whatever is open to a State when it is the immediate victim of a violation of the Sherman Law. We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Reason balks against implying denial of such a remedy to a State which purchases materials for use in building public highways. Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in § 7 as to exclude a State. Such a construction would deny all redress to a State, when muleted by a violator of the Sherman Law, merely because it is a State.

316 U.S. at 162-63.

We find the same reasoning applicable to a foreign sovereign who claims injury due to antitrust violations and seeks to recover treble damages under the Clayton Act. When Congress enacted the antitrust laws, it expressly recognized that illegal contracts, conspiracies and monopolies by domestic firms may affect commerce with other nations.[7] In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right.[8] There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper*, no other provisions of the Act support the contention that Congress intended to exclude foreign nations. We find that the district court correctly held that foreign nations are "persons" under § 4 of the Act entitled to sue for treble damages.

The judgment is affirmed.

Ross, Circuit Judge, Concurring.

I concur in the opinion of Judge Lay because I think the result is mandated by *Georgia* v. *Evans*, *supra*. I believe, however, that Congress, in passing § 4 of the Clayton Act,

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7. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . with foreign nations." Section 2 of the Act, 15 U.S.C. § 2, refers to the same commerce "with foreign nations" in prohibiting monopolization. The definition of "commerce" in § 1 of the Clayton Act, 15 U.S.C. § 12, refers three times to commerce "with foreign nations."

8. More than one hundred years ago, the Supreme Court of the United States recognized:

> Every sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. *Cotton* v. *United States*, 52 U.S. 228, 230-31 (1850).

15 U.S.C. § 15, gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are "persons" under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.

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Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

Appendix C

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA—FOURTH DIVISION

4-71 Civil 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS

4-72 Civil 312

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,
Plaintiff,

vs.

PFIZER, INC.; AMERICAN CYANAMID COMPANY; BRISTOL-MYERS COMPANY; SQUIBB, INC.; E. R. SQUIBB AND SONS, INC.; OLIN CORP.; AND THE UPJOHN COMPANY,
Defendants.

MISCELLANEOUS ORDER NO. 74-31

MEMORANDUM OPINION AND ORDER

The complaint in this action was filed in the District of Columbia on behalf of the Republic of the Philippines by and through the Central Bank of the Philippines. Shortly thereafter the Judicial Panel on Multidistrict Litigation, pursuant to 28 U.S.C. § 1407, transferred the action to this district for inclusion in the coordinated or consolidated pretrial proceedings in this litigation. Plaintiff alleges that defendants have violated the United States antitrust laws and seek treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. Defendants plead as affirmative

defenses that the Republic of the Philippines lacks standing to sue under Section 4 of the Clayton Act and that, in any event, the Central Bank of the Philippines lacks capacity and authority to maintain this action on behalf of that foreign sovereign.

Pursuant to Rule 12(d) of the Federal Rules of Civil Procedure, plaintiff moved for an early determination of these issues and an order striking defendants' affirmative defenses.[1] On the basis of the briefs filed and the arguments heard, the Court finds (1) that the Republic of the Philippines, a foreign nation, is a "person" within the meaning of the federal antitrust laws and has standing to maintain an action for treble the damages suffered as a result of alleged violations of those laws; and (2) that the act of state doctrine precludes inquiry into the capacity and authority of the Central Bank of the Philippines to maintain this action on behalf of the Republic of the Philippines.

I. Standing of the Republic of the Phillipines

Earlier in these coordinated or consolidated pretrial proceedings, defendants moved to dismiss a similar private antitrust action brought by Kuwait, a foreign sovereign government, seeking treble damages under Section 4 of the Clayton Act. Defendants argued that Kuwait, as a foreign sovereign government, lacked standing to sue for treble damages under the federal antitrust laws. Following extensive briefing and argument, the Court held that a foreign nation is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action for damages resulting

1. Specifically, the affirmative defenses designated in the answers as "First," "Second," "Third," and "Sixth" Defenses by Pfizer; "C" and "E" by American Cyanamid; Paragraphs "83" and "84" by Bristol-Myers; and "Third" and "Fourth" Defenses by Squibb, Inc., E. R. Squibb and Sons, Inc. and Olin Corporation. This Opinion and Order also applies to the extent that these issues are raised in general terms or as part of other enumerated defenses.

from alleged violations of those laws.[2] *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971) (Miles W. Lord, J., sitting by designation).

Defendants raise the same issue as a defense to this action. They contend that, absent special legislative mandate, foreign governments are not "persons" within the purview of the Clayton Act and that, therefore, the Republic of the Philippines lacks standing to sue under Section 4 of the Act. Inasmuch as defendants advance essentially the same arguments as those asserted in the *State of Kuwait* action, the Court finds that its holding and the *ratio decidendi* in that action apply with equal force and effect to the *Republic of the Philippines* action.

II. The Capacity of the Central Bank of the Philippines to Maintain This Action on Behalf of the Republic of the Philippines

Plaintiff urges that two letters addressed to the Court from His Excellency Eduardo Z. Romualdez, the Ambassador of the Philippines to the United States, support its contention that the act of state doctrine precludes defendants from challenging the capacity and authority of the Central Bank to maintain this action on behalf of the Republic of the Philippines.[3] Defendants argue that the

2. The Court also found its holding to "apply with equal force and effect" to the private treble damage antitrust action brought by the Republic of Viet Nam. *In re Antibiotic Antitrust Actions, infra* at 315, n. 1. The Court certified for immediate appeal its Order denying defendants' motion to dismiss, 28 U.S.C. § 1292(b), and defendants timely filed a petition for permission to appeal with the Court of Appeals for the Second Circuit. Prior to a determination by the appellate court, the parties voluntarily dismissed the appeal.

3. The pertinent language from each letter is as follows:

> This is to make of record that the above captioned action on behalf of the Republic of the Philippines represents the official action of the Philippine Government pursuant to actions taken by the Secretary of Justice of the Philippines and the Central

act of state doctrine is not applicable and that under Philippine law the Central Bank lacks the legal capacity to assert a claim on behalf of the Philippines sovereign. Defendants further argue that, in any event, before the Court can determine whether the act of state doctrine does apply defendants should be permitted to inquire into the facts surrounding the alleged "act of state."

The following language in *Underhill* v. *Hernandez*, 168 U.S. 25 (1897), is generally recognized as the origin of what has come to be known as the act of state doctrine:[4]

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves. *Id.* at 252.

The Supreme Court further developed the doctrine in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303, 304 (1918); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918); and, more thoroughly, in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 416-30 (1964). The most recent Supreme Court pronouncements concerning the act of state

Bank of the Philippines. (Ambassador Romualdez's letter of July 14, 1972.)

I have been instructed by my Government to inform you that the above captioned action on behalf of the Republic of the Philippines was authorized and approved and represents the official action of the Philippine Government. (Ambassador Romualdez's letter of September 25, 1972.)

4. Earlier intimations of the concept can be found in three Supreme Court decisions relating to the seizure of vessels. *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293 (1808); the *Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812); and *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822).

doctrine appear in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972):

> The doctrine precludes any review whatsoever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State. *Id.* at 763.
>
> . . .
>
> The act of state doctrine . . . has its roots, not in the Constitution, but in the notion of comity between independent sovereigns. . . . The line of cases from this Court establishing the act of state doctrine justifies its existence primarily on the basis that juridical review of acts of state or a foreign power could embarrass the conduct of foreign relations by the political branches of the government. *Id.* at 765.

Defendants suggest that the act of state doctrine is not applicable to the facts of this case because a foreign sovereign, as a party-plaintiff, cannot invoke the doctrine and because that doctrine is limited to foreign acts of expropriation. It is clear from *Sabbatino* that a foreign government plaintiff in our courts is not precluded from invoking the doctrine. *Banco Nacional de Cuba* v. *Sabbatino*, *supra* at 437. And the Court finds little persuasive support in the cases and literature commenting on the doctrine for defendants' suggestion that the doctrine is limited to foreign acts of expropriation. *See, e.g., Pasos* v. *Pan American Airways*, 229 F.2d 271, 272, 273 (2d Cir. 1956); *United States ex rel. Steinvorth* v. *Watkins*, 159 F.2d 50, 51 (2d Cir. 1947); *Banco de Espana* v. *Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940); Mann, *The Legal Consequences of Sabbatino*, 51 VA. L. REV. 604, 623 (1965).

Defendants also contend that there is no statutory or judicial authority under applicable Philippine law to support the institution of this action by the Central Bank of the Philippines on behalf of the Republic of the Philippines. But an examination by our Courts of the acts of a recognized foreign sovereign within its own borders, in order to

determine whether or not those acts were legal under the laws of the foreign state, is the very practice that the act of state doctrine is intended to prevent. Not only would inquiry into the validity of an act of state under the law of that state "be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." *Banco Nacional de Cuba* v. *Sabbatino, supra* at 415, n. 17. Our Courts have consistently refused to conduct such an inquiry.[5] Whether the foreign state's act is partially or wholly, technically or fundamentally, illegal under the state's local law is of no moment. The sole concern is whether the purported act of state is the act of a recognized foreign sovereign; if so, no matter how grossly the sovereign has transgressed its own laws,[6] the details of such action or the merit of the result cannot be questioned but must be accepted by our Courts. *Ricaud* v. *American Metal Co., supra* at 309.

Defendants argue as a last resort that, in any event, the act of state doctrine does not preclude inquiry into whether an "act of state" actually occurred. They rely on *Companie Espanola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 75, 76 (1938), to support their contention that the Court does not have to accept Ambassador Romualdez's assertions as conclusive proof of the fact that the Central Bank was officially authorized to bring this action on behalf of the Republic of the Philippines and that inquiry into the facts surrounding this alleged "act of state" is permissible.[7]

5. *See, e.g., Bernstein* v. *Van Heyghen Freres Societe Anonyme*, 163 F.2d 246, 249 (2d Cir. 1947); *Banco de Espana* v. *Federal Reserve Bank, supra* at 443, 444; *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92, 102, 110 (C.D. Cal. 1971), *aff'd*. 461 F.2d 1261 (9th Cir. 1972); *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892, 913, 914 (S.D.N.Y. 1968), *aff'd*. 433 F.2d 686 (2d Cir. 1970), *cert. denied* 403 U.S. 905 (1971).

6. *Banco de Espana* v. *Federal Reserve Bank, supra* at 444.

7. Defendants also assert that such inquiry should be permitted because it would pose no threat to the foreign relations between the United States and the Philippines. But the judicial branch of our government is ill-equipped to undertake the task of ascertaining what impact, if any, such inquiry will have at this time, or at some future date, on the United States' foreign relations with the Philippines and the act of state doctrine relieves the Courts of the burden of attempting to make such determinations.

This argument is, in essence, another attack on the applicability of the doctrine to the facts of this case. The facts of *The Navemar* case are clearly distinguishable from those raised in this action and the Supreme Court's decision cannot be fairly viewed as persuasive authority in support of defendants' argument. An act of state has been described as "any governmental act in which the sovereign's interest qua sovereign is involved."[8] And, the Court finds the following language in *Banco de Espana* v. *Federal Reserve Bank, supra* at 443, persuasive and controlling as to the facts presented here:[9]

> [T]he governmental acts of a foreign country done within its own borders are not subject to examination in our courts. It would seem to follow that the statement that such acts had taken place, made to our courts officially on behalf of the friendly foreign government by its accredited representative, must be accepted as proof of that fact.

Therefore, the Ambassador's statement that the action brought by the Central Bank of the Philippines on behalf of the Republic of the Philippines was "authorized and approved and represents the official action of the Philippine Government" offers convincing evidence of a governmental act of the Philippine government performed in the Philippines and is conclusive upon the Court. The act of state doctrine precludes inquiry, either directly or collaterally, into the validity of or the circumstances surrounding the act of state.

8. *Banco Nacional de Cuba* v. *Sabbatino, supra* at 445, n. 3 (dissenting opinion, White, J.)

9. *See also, Ricaud* v. *American Metal Co., supra* at 309.

It Is Therefore Ordered That defendants' affirmative defenses to the above-captioned action relating to (1) the standing of the Republic of the Philippines to sue for treble damages under the antitrust laws of the United States, and (2) the capacity and authority of the Central Bank of the Philippines to maintain this action on behalf of the Republic of the Philippines be, and the same hereby are, stricken from the pleadings.

Dated: January 16, 1974

/s/ Miles W. Lord

Miles W. Lord
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT

District of Minnesota—Fourth Division

4-71 Civ. 435 and Civ. 4-74 496

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS

The Government of India,

Plaintiff,

— against —

Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc. and E. R. Squibb & Sons, Inc.,

Defendants.

Miscellaneous Order No. 75-48

Plaintiff, the Government of India, filed this action in this Court on October 11, 1974. Defendants moved on October 17, 1974, pursuant to Rule 12(b)(6), F.R.Civ.P., to dismiss this action for failure to state a claim upon which relief can be granted, on the ground that the Complaint fails to state a claim under Section 4 of the Clayton Act (15 U.S.C. § 15) because plaintiff, a foreign government, is not a "person" entitled to sue under that statute. This matter was discussed at a pretrial hearing on October 22, 1974.

Earlier in these consolidated pretrial proceedings, following extensive briefing and argument, this Court held that the State of Kuwait, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action under Section 4 of the Clayton Act.

In re Antibiotic Antitrust Actions, 333 F.Supp. 315 (S.D. N.Y. 1971) (Miles W. Lord, Jr., sitting by designation).

Being fully advised in the premises, the Court finds that its holding and the *ratio decidendi* in the *State of Kuwait* action apply with equal force and effect to this action by the Government of India; therefore, the Court holds that plaintiff, The Government of India, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and thus is entitled to maintain this action under Section 4 of the Clayton Act.

Defendants, in their motion of October 17, 1974, requested this Court to certify its decision, if adverse to defendants, for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The Court concurs with the recent statement by the Court of Appeals that this issue of the standing of foreign governments is "a difficult question of statutory interpretation, a question apparently of first impression." *Pfizer Inc., et al. v. Hon. Miles W. Lord and Republic of Vietnam, et al.*, 522 F.2d 612, 615 (8th Cir. 1975). Moreover, the Court recognizes that this standing matter is a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery.

Therefore, It Is Hereby Ordered:

1. Defendants' motion to dismiss, filed October 17, 1974, is denied; and

2. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of this litigation.

Dated: December 27, 1975.

/s/ Miles W. Lord

Miles W. Lord
U. S. District Judge

Appendix E

UNITED STATES DISTRICT COURT

District of Minnesota—Fourth Division

4-71 Civ. 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS

and

4-71 Civ. 402

The Republic of Vietnam,

Plaintiff,

v.

Pfizer Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Inc., E. R. Squibb & Sons, Inc., Olin Corporation and The Upjohn Company,

Defendants.

4-72 Civ. 312

The Republic of the Philippines by and through the Central Bank of the Philippines,

Plaintiff,

v.

Pfizer, Inc., *et al.*,

Defendants.

4-74 Civ. 65

The Imperial Government of Iran,

Plaintiff,

v.

Pfizer Inc., *et al.*,

Defendants.

MISCELLANEOUS ORDER No. 75-49

Plaintiffs are three foreign sovereign governments* whose actions are here as part of the above-captioned coordinated pretrial proceedings in the antibiotic antitrust actions. In all three cases, defendants have asserted by way of affirmative defenses that the plaintiff foreign governments are not "persons" entitled to sue under Section 4 of the Clayton Act, 15 U.S.C. § 15. Additionally, in the *Vietnam* and *Philippines* actions, defendants timely moved to dismiss under Rule 12(b)(6), F.R.Civ.P., on that ground. This matter has been briefed and discussed at several pretrial hearings.

Earlier in these consolidated pretrial proceedings, following extensive briefing and argument, this Court held that the State of Kuwait, a foreign sovereign nation, is a "person" within the meaning of the United States antitrust laws and, therefore, is not precluded from maintaining a treble damage action under Section 4 of the Clayton Act. *In re Antibiotic Antitrust Actions*, 333 F.Supp. 315 (S.D. N.Y. 1971) (Miles W. Lord, Jr., sitting by designation).

The Court has not previously entered an order on the "person" question in either *Vietnam* or *Iran;* however, the Court did state in a footnote to its opinion in the *State of Kuwait* action that its holding there would "apply with equal force and effect" to the *Republic of Vietnam* action (333 F.Supp. at 315, n. 1). In the action brought by the Republic of the Philippines, this Court held on January 16, 1974, in Miscellaneous Order No. 74-31 that that foreign

*On September 11, 1975, defendants moved pursuant to Rule 12, F.R.Civ.P. to dismiss the action brought by The Republic of Vietnam (No. 4-71 Civ. 402) on the ground that the plaintiff as named and described in the Amended Complaint no longer exists in any form recognizable by this Court and has not been succeeded by any government, entity or person that has capacity to sue in this Court. That motion has been fully briefed and is pending decision by this Court. In entering this Order, the Court expresses no view on the merits of that motion to dismiss.

nation is a "person" within the meaning of the antitrust laws and has standing to bring this action.

On June 25, 1974, defendants requested this Court to enter orders on the "person" question in *Vietnam* and *Iran* and, if adverse to defendants, to certify those orders pursuant to 28 U.S.C. § 1292(b). In the same request, defendants asked this Court to amend its Miscellaneous Order No. 74-31 in the *Philippines* action by adding the language necessary to certify that opinion to the Court of Appeals. Following briefing and argument, the Court did not enter any order in *Vietnam* and *Iran*, and denied the request to amend Order No. 74-31. Miscellaneous Order No. 74-39, entered September 5, 1974.

Being fully advised in the premises, the Court finds that its holding and the *ratio decidendi* in the *State of Kuwait* action apply with equal force and effect to these actions by the Republic of Vietnam and the Imperial Government of Iran; therefore, the Court holds that plaintiffs, the Republic of Vietnam and the Imperial Government of Iran, foreign sovereign nations, are "persons" within the meaning of the United States antitrust laws and thus are entitled to maintain these actions under Section 4 of the Clayton Act. At the same time, the Court reaffirms its holding in Miscellaneous Order No. 74-31 that the Republic of the Philippines is similarly entitled as a "person" to bring its action.

By Miscellaneous Order No. 75-48 entered today, this Court has held that the Government of India is a "person" entitled to sue under Section 4 of the Clayton Act and has certified that decision pursuant to 28 U.S.C. §1292(b).

The Court concurs with the recent statement by the Court of Appeals that this issue of the standing of foreign governments is "a difficult question of statutory interpretation, a question apparently of first impression." *Pfizer Inc., et al* v. *Hon. Miles W. Lord and Republic of Vietnam, et al*, 522 F.2d 612, 615 (8th Cir. 1975). Moreover, the

Court recognizes that this standing matter is a threshold issue which should be resolved before the parties become further involved in other pretrial proceedings and discovery. The Court is now of the opinion that the "person" question should receive appellate attention not only in *India* but also in the three earlier-filed actions—*Vietnam*, *Philippines* and *Iran*—in the interest of proceeding expeditiously with this litigation.*

With regard to appeals by permission under 28 U.S.C. §1292(b), Rule 5(a) of the Federal Rules of Appellate Procedure provides, *inter alia:* "An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended." Counsel for the Republic of the Philippines, in a letter to this Court dated September 26, 1975, requested that the "person" question be certified in the *Vietnam*, *Philippines* and *Iran* actions if it were certified in *India*. Counsel for the Imperial Government of Iran concurred in that request in his letter to this Court dated October 2, 1975. The Court hereby grants that request and respectfully suggests that the Court of Appeals may wish to consider the further suggestion of those plaintiffs that any appeal from this Order be considered by the same panel which received briefs and heard argument on defendants' petition for writ of mandamus on the "person" question in *Pfizer Inc., et al* v. *Hon. Miles W. Lord and Republic of Vietnam, et al, supra* (opinion dated August 27, 1975).

* On November 29, 1974, the Federal Republic of Germany filed a similar action in this Court (Civil Action No. 4-74 614). On December 9, 1974, defendants filed a motion to dismiss that action on the ground, *inter alia*, that the Federal Republic of Germany is not a "person" entitled to sue under Section 4 of the Clayton Act. The parties have indicated that special considerations may apply to the *Germany* case and thus defendants' motion to dismiss is not yet ready for decision.

Therefore, It Is Hereby Ordered:

1. Plaintiffs the Republic of Vietnam and the Imperial Government of Iran are "persons" within the meaning of Section 4 of the Clayton Act and thus are entitled to bring these actions; therefore, to the extent consistent with this Order, defendants' motion to dismiss *Vietnam* dated March 12, 1971, is denied and defendants' affirmative defenses in *Vietnam* and *Iran* are striken;

2. Miscellaneous Order No. 74-31 dated January 16, 1974, is amended to include the following language:

> This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

and

3. This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: December 27, 1975.

/s/ Miles W. Lord

Miles W. Lord
U.S. District Judge

F-1

JUDGMENT

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 76-1064, September Term, 1975

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, E. R. SQUIBB & SONS INC., OLIN CORPORATION, AND THE UPJOHN COMPANY

Appellants

vs.

THE GOVERNMENT OF INDIA, THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, AND THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,

Appellees

UNITED STATES OF AMERICA,

Amicus Curiae

APPEAL FROM the United States District Court for the District of Minnesota.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Minnesota and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed in accordance with the majority opinion of this Court.

September 3, 1976
Filed October 12, 1976

Harry A. Sieben, *Clerk*

by Margaret Krieser
Deputy

A true copy.

Attest:

/s/ Robert C. Tucker

Clerk, U.S. Court of Appeals, 8th Circuit
October 7, 1976

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 1, 1976
CERTIORARI GRANTED APRIL 18, 1977

CONTENTS OF APPENDICES

NOTE: The Following Items Are Printed in the **Appendix to the Petition for Certiorari** ("Pet. App.") and Are Not Reproduced in This Appendix.

INDEX TO THIS APPENDIX

RELEVANT DOCKET ENTRIES

COURT OF APPEALS

DATE	PROCEEDINGS
1/ 7/76	Petition for permission to appeal pursuant to 28 U.S.C. §1292(b).
1/15/76	Opposition to petition for permission to appeal pursuant to 28 U.S.C. §1292(b).
1/19/76	Answer of respondent Republic of Philippines to petition for permission to appeal.
1/22/76	Docketing case.
1/22/76	Order: Petition to take interlocutory appeal is granted; clerk directed to regularly docket this appeal.
2/11/76	Mo U.S. for lv to participate in o/a as amicus curiae. [Handwritten] use briefs in 74-1680, 74-1847, 74-1870.
2/26/76	Order: Counsel for the U.S. granted ten minutes oral argument as amicus curiae; counsel for appellants may have additional five minutes to respond.
3/ 1/76	Appearance for United States as amicus curiae.
3/11/76	Argued & submitted before Judges Lay, Ross & Stephenson; for appellant Samuel W. Murphy, Jr.; for appellee Philippines, Douglas Rigler; for appellee India, Julius Kaplan; for appellee Iran, Harold C. Petrowitz; for amicus U.S., Catherine G. O'Sullivan, Justice Dept.; conclusion by Mr. Murphy; recorded—
5/19/76	Opinion by Judge Lay (Published) concur Ross.
5/19/76	Judgment: Judgment of district court is affirmed.
6/ 2/76	Petition for rehearing en banc and rehearing (appellants).

Relevant Docket Entries

DATE	PROCEEDINGS
6/24/76	Order: Petition for rehearing with suggestions for rehearing en banc is granted; clerk directed to schedule case for oral argument and submission to court en banc at session to be held in St. Louis, Missouri, in September 1976. (to be St. Paul 8-17).
7/26/76	Mo of U.S. for lv to participate in o/a as amicus curiae at en banc hearing.
7/27/76	Order: Amicus curiae U.S. granted leave to make oral argument; amicus allowed fifteen minutes for oral argument.
8/ 2/76	Mo appellants for additional argument time to respond to amicus curiae.
8/ 5/76	Order: Counsel for appellants may have ten additional minutes to make oral argument responsive to the oral argument of amicus curiae U.S.
8/ 6/76	[Oral Argument] Transferred to 8-17-76 session. St. Paul.
8/17/76	Supplemental response of U.S. as amicus curiae.
8/17/76	Argued and submitted to the Court En Banc: Gibson, Lay, Heaney, Bright, Ross, Stephenson, Webster, Henley. Samuel W. Murphy, Jr. for appellant. Douglas V. Rigler for Philippines; Julius Kaplan for India; Harold Petrowitz for Iran. Catherine O'Sullivan, Dept. of Justice for amicus United States. Concluded by Mr. Murphy. Recorded.
9/ 3/76	Per curiam opinion; dissenting opinion by Judges Bright & Henley (Printed, Published)
9/ 3/76	Judgment: Judgment of district court is affirmed.

Relevant Docket Entries

DATE	PROCEEDINGS
9/21/76	Mo appellants for stay of mandate.
10/ 5/76	Order: Appellants' motion for stay of mandate is denied.
10/ 7/76	Mandate issued.
10/14/76	Receipt for mandate.
12/ 6/76	Notice of filing of petition for writ of certiorari to the Supreme Ct. as Case No. 76-749, (as of 12/1/76).

DISTRICT COURT

2/10/70	Complaint, appearance. Jury demanded. (70 C. 299 (N.D. Ill.))—Vietnam
3/ 5/70	Filed letter and order of Multidistrict Litigation Panel requesting transfer of Northern Dist. of Ill. Case No. 70 C. 299 to SDNY for pretrial coordinated hearings.—Viet-Nam
3/20/70	Filed Answer of American Cyanamid Co. in 70 Civ. 877.—Viet-Nam
4/23/70	Filed Answer of The Upjohn Co. in 70 Civ. 877 —Viet-Nam
4/24/70	Filed Answer of Olin Corp. (Squibb) 70 Civ. 877—Viet-Nam
4/24/70	Filed Answer of Chas. Pfizer & Co. Inc. to Complaint in 70 Civ. 877—Viet-Nam
3/22/71	Filed Notice of Motion re: dismiss complaint of Republic of Viet-Nam in 70 Civ. 877—Viet-Nam
8/17/71	Filed order of transfer from Southern District of New York; Administrative Order No. 71-12,

DATE	PROCEEDINGS
	Filed in Southern District of New York on August 6, 1971—Viet-Nam
4/ 4/72	Complaint, appearance. Jury Demanded.—Philippines
5/25/72	Re: Republic of the Philippines v. Chas. Pfizer & Co. (D.C. No. 650-72) Filed Order, transferring above case to District of Minnesota. D. Minn. No. 4-72 Civ. 312.—Philippines
5/30/72	Re: Republic of the Philippines et al. v. Pfizer Inc., et al. Filed Answer of American Cyanamid Co. to complaint of plaintiff praying for dismissal of complaint with affidavit of service by mail on May 26, 1972 attached.—Philippines
5/31/72	Re: Republic of the Philippines v. Pfizer. Filed Answer of the Upjohn Company in the above suit with attached affidavit of service by mail on May 26, 1972.—Philippines
6/ 2/72	Re: Republic of Philippines v. Chas. Pfizer, Inc. et al. Filed Answer of Deft. Bristol-Myers Co. with afft. of service by mail on May 26, 1972 attached.—Philippines
6/21/72	Filed Motion to bring the Philippines Action within the purview of Misc. Order 71-13, or to bring certain defenses on promptly for preliminary hearing & determination as provided by Rule 12(d) or to strike certain of the defts affirmative defenses and accompanying Memorandum with attached cert. of service.—Philippines
11/ 3/72	Entered record of pretrial conference, Nov. 1, 1972, Mpls.—All Actions

DATE	PROCEEDINGS
12/17/73	Filed Motion to Amend Complaint (4-72 Civil 312 Philippines) ([proposed] Amended Complaint attached) Afft. of Service.—Philippines
1/14/74	Filed Motion to Amend Complaint, and Memorandum in Support Thereof. Afft. of Service for this & next document. (4-71 Civ. 402)—Viet-Nam
1/14/74	Filed [Proposed] Amended Complaint. (4-71 Civ. 402)—Viet-Nam
1/14/74	Filed Motion to Further Amend Complaint. [Proposed] further amendments attd. Afft. of Service. (4-72 Civ. 312)—Philippines
1/17/74	Filed Miscellaneous Order No. 74-31. Memorandum Opinion and Order Striking affirmative defenses relating to standing of Philippines and authority of Central Bank of the Philippines to maintain this action. (4-72 Civil 312)—Philippines
2/ 5/74	Filed Complaint, with jury trial demanded.—Iran
2/ 6/74	Received File on Case No. Civil 4-74-65, Imperial Government of Iran v. Pfizer, et al. (Transferred from Hon. E. Larson).—Iran
2/25/74	Filed Miscellaneous Order 74-32. Granting Leave to Amend Complaints in the following actions: 4-71 Civ. 6, 403, 413; 4-72 Civ. 312; 70 Civ. 180, 1605 (SDNY). (Served by Clerk on J. Cochrane, P. Dorsey, R. Seefried)—Philippines
3/18/74	Filed Answer of the Upjohn Company. Afft. of Service. (4-74-65)—Iran.
3/18/74	Filed Answer of Defendants Olin Corporation, Squibb, Inc. & E. R. Squibb & Sons, Inc. Afft. of Service. (4-74-65)—Iran

Relevant Docket Entries

DATE	PROCEEDINGS
3/20/74	Filed Answer [of Bristol] (4-74-65, Iran). Afft. of Service.—Iran
3/21/74	Filed Answer of American Cyanamid Company. Jury Trial Demanded. (4-74-65, Iran). Cert. of Service.—Iran
3/28/74	Filed Notice that Plaintiff is Filing an Amended Complaint. (4-71 Civ. 402)—Viet-Nam
3/28/74	Filed Amended Complaint. Jury Trial Demanded. (4-71 Civ. 402, Viet-Nam). Afft. of Service for this and preceding document.—Viet-Nam
3/28/74	Filed Plaintiff's Motion to Consolidate. [Proposed Order attached] Cert. of Service. (4-74-65, Iran)
4/ 1/74	Filed Miscellaneous Order 74-33. (Granting leave to file Amended Complaint). (4-71 Civ. 402. Viet-Nam) (Served by Clerk on P. Dorsey, R. Seefried, J. Cochrane).—Viet-Nam
4/ 3/74	Filed Amended Complaint. (4-72 Civ. 312, Philippines) [Further Amendment Attached] Afft. of Service.—Philippines
4/ 3/74	Filed Motion to File a Further Amendment to Plaintiff's Complaint. [Proposed Further Amended Attached] Afft. of Service. (4-71 Civ. 402)—Viet-Nam
4/ 9/74	Filed Answer of American Cyanamid Company to Amended Complaint. Jury Trial Demanded. Cert. of Service. (4-71 Civ. 402, Viet-Nam)
4/10/74	Filed Answer of Pfizer Inc. to Amended Complaint. Cert. of Service. (4-71 Civ. 402) Viet-Nam. Jury Trial Demanded

Relevant Docket Entries

DATE	PROCEEDINGS
4/24/74	Filed Answer of Pfizer Inc. to Amended Complaint. Cert. of Service. (4-72 Civ. 312) Philippines. Jury Trial Demanded
4/25/74	Filed Answer of Defendants Olin Corporation, Squibb, Inc., and E. R. Squibb and Sons, Inc. to the "Amended Complaint and Further Amendment to Complaint" Afft. of Service.—Philippines
4/25/74	Filed Answer [of Bristol-Myers Company to Amended Complaint]. Afft. of Service.—Philippines.
4/25/74	Filed Answer of the Upjohn Company to the Amended Complaint. Cert. of Service.—Philippines.
4/26/74	Filed Answer of American Cyanamid Company to Amended Complaint. Jury Trial Demanded. Afft. of Service.—Philippines
6/26/74	Filed Request for Certification by defendants in cases The Republic of Vietnam v. Pfizer, et al. No. 4-71 Civ. 402; The Imperial Government of Iran v. Pfizer Inc., et al. No. 4-74 Civ. 65; and The Republic of the Philippines, etc. v. Pfizer Inc., No. 4-72 Civ. 312, by the Court of its Miscellaneous Order 73-31 dated January 16, 1974 and Miscellaneous Order 73-37, dated June 17, 1974, with Aff. of Serv. by mail on 6/25/74 attached.—Iran, Viet-Nam, Philippines
9/ 5/74	Filed Miscellaneous Order 74-39. [Denying request for certification of Miscellaneous Order 74-31] (4-71 Civ. 435, 4-71 Civ. 402, 4-72 Civ. 312, Civ. 4-74-65) (Served on P. Owens, R. Johnson, P. Dorsey, R. Seefried)—Viet-Nam, Philippines, Iran

DATE	PROCEEDINGS
10/11/74	Filed Complaint.—India, Civ. 4-74-496.
10/15/74	Filed Order of Direction to Clerk of Court assigning case no. Civil 4-74-496 to Judge Miles W. Lord. (Served: R. Johnson, P. Owens, R. Seefried, P. Dorsey, L. Velvel) (Comp. to: 4-71 Civ. 435)—India
10/17/74	Filed Notice of Motion [to dismiss]. Supporting Afft. of Peter Dorsey. Exhibit. Cert. of Service.—India
10/17/74	Received file of companion case, Civ. 4-74-496, *The Government of India* v. *Pfizer, Inc., et al.*
10/21/74	Filed Motion to Consolidate [pursuant to Rule 42] (4-74-496) Cert. of Service.—India
10/23/74	Filed transcript of proceedings of October 22, 1974. All Actions. (Breviu, Kunde, Triden—R)
10/29/74	Related case filed; *Federal Republic of Germany* v. *Pfizer et al.* (See case file Civ. 4-74-614).—Germany
9/ 8/75	Filed Answer of American Cyanamid Company to Complaint. Jury Trial Demanded. Cert. of Serv.—India
9/ 9/75	Filed Answer of Bristol-Myers Company to Complaint. Jury Trial Demanded. Cert. of Serv.—India
9/16/75	Filed Answer of Defendants Olin Corporation, Squibb, Inc., and E. R. Squibb and Sons, Inc. Cert. of Serv.—India
9/18/75	Filed Answer of The Upjohn Company. Jury Trial Demanded. Cert. of Serv.
9/24/75	Filed ent copy Opinion from U.S. Court of Appeals for the Eighth Circuit (denying petition

DATE	PROCEEDINGS
	for writ of mandamus; reversing district court's permitting govts to proceed in official representative or parens patriae capacities; remanding cause to district court with directions to dismiss that count of pltfs complaints for failure to state proper claim for relief.) (Their case Nos. 74-1680, 74-1847 and 74-1870, 8/27/75) (Served: P. Owens, R. Johnson, P. Dorsey, R. Cahn) (Dist. Ct. Nos. Mis. 74-31; 4-71-402; 4-74-65; 4-72-312 and Civ. 4-74-496 per cover letter)
9/24/75	Filed ent Certified Copy of Judgment from U.S. Court of Appeals for the Eighth Circuit (. . . "it is now here ordered and adjudged by this Court that the petition for writ of mandamus be and is hereby denied. And it is further ordered by this Court that the order of the District Court permitting the governments to proceed in their official representative or parens patriae capacities is reversed. And it is further ordered by this Court that the order of the District Court permitting the governments to proceed in their official representative or parens patriae capacities is reversed. And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court with directions to dismiss that count of plaintiffs' complaints for failure to state a proper claim for relief." 8/27/75. Order ent in accordance with opinion Clerk, USCA, 8th Cir. 9/22/75. Their case Nos. 74-1680, 74-1847 and 74-1870) (Served: P. Owens, R. Johnson, P. Dorsey, R. Cahn)
10/22/75	Filed Notice of Motion (by dfts for an order per 28 USC §1404(a) transferring captioned actns to D.C. D.C.) Affidavit of Samuel W. Murphy, Jr. Memorandum in Support of Defendants'

DATE	PROCEEDINGS
	Motion to Transfer these Actions to the District of Columbia. Cert. of Serv. (AA; 4-71 Civ. 402, 4-72 Civ. 312, 4-74 Civ. 65, 4-74-Civ. 614. Also 4-74-496)—Viet-Nam, Philippines, Iran, Germany, India
10/24/75	Filed ent Order (Lord, J., 10/24/75; Ordered that paragraphs 10 and 11 of the complaint in 4-71 Civ. 402 are dismissed for failure to state proper claim for relief and that paragraphs 10 and 11 of complaint in Civ. 4-74-65 are dismissed for failure to state proper claim for relief.) (AA; 4-71 Civ. 402; Civ. 4-74-65) (P. Owens, R. Johnson, P. Dorsey, R. Cahn).—Viet-Nam, Iran
11/26/75	Filed Order (that Order of 10/24/75 is amended nunc pro tunc so as to dismiss paragraphs 10 and 11 of amended complaint in 4-71 Civ. 402, ¶ 10 and 11 of complaint in Civ. 4-74-65, and ¶ 10 and 11 of Complaint in Civ. 4-74-496 for failure to state proper claim for relief. Lord, J., 11/26/75) (AA; 4-71 Civ. 402; Civ. 4-74-65, and also comp. case Civ. 4-74-496) (copies: P. Dorsey, P. Owens, R. Johnson, R. Cahn) ent—Viet-Nam, Iran, India
12/29/75—	Filed in Civ. 4-74-496 as document #19: Miscellaneous Order No. 75-48. (Lord, J., 12/27/75. Dfts mtn to dismiss fld 10/17/74 [in Civ. 4-74-496] is denied; this Ct. of opinion that this order involves controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal from this order may materially advance ultimate termination of this litigation) (4-71 Civ. 435; Civ. 4-74-496 also) (J. Kaplan, P. Owens, P. Dorsey, R. Cahn, R. Johnson)

DATE	PROCEEDINGS
12/29/75	Filed ent Miscellaneous Order No. 75-49 (Lord, J., 12/27/75. Pltfs Vietnam and Iran are "persons" within meaning of §4 Clayton Act and thus entitled to bring these actions; therefore, to extent consistent with this order, dfts mtn to dismiss Vietnam dated 3/12/71 is denied and dfts' affirmative defenses in Vietnam and Iran are striken. Miscellaneous Order 74-31 dated 1/16/74 is amended to include following language: "This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation," and This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.) (4-71 Civ. 435; 4-71 Civ. 402; 4-72 Civ. 312; and Civ. 4-74-65) (P. Owens, R. Johnson, P. Dorsey, R. Cahn)
7/23/76	Motion of the Government of Korea to withdraw and for an Order dismissing its complaint; together with points and authorities in support of its motion; proposed Order; and Certificate of Service by mail on 7/13/76 attached.
10/12/76	Opinion from U.S. Court of Appeals for the Eighth Circuit affirming the District Court. (Copies to Counsel: P. Owens, P. Sprenger, P. Dorsey, R. Cahn, H. Petrowitz) (Re: No. 76-1064)
10/12/76	Judgment from U.S. Court of Appeals for the Eighth Circuit affirming the District Court. (Copies to Counsel: P. Owens, P. Sprenger, P. Dorsey, R. Cahn, H. Petrowitz) (Re: No. 76-1064)

Relevant Docket Entries

DATE	PROCEEDINGS
10/27/76	Order (Lord, J., 10/27/76: Ordered that having considered plaintiff's motion to dismiss the above-captioned action and having considered the lack of opposition thereto this Court has determined that such request should be granted and it is hereby, Ordered that the above captioned action by the Government of Korea is hereby dismissed) (4-71 Civ. 435; Civ. 4-76-48) (Served: R. Cahn, P. Owens, P. Sprenger, P. Dorsey, J. Kaplan)—Korea
12/ 2/76	ORDER (Lord, J. 12/2/76, Ordered: That this action [Republic of Vietnam v. Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Squibb Inc., E. R. Squibb & Sons, Inc., Olin Corporation and The Upjohn Co.] is dismissed with prejudice and without cost to either party) (AA; 4-71 Civ. 402) (served: P. Owens, P. Sprenger, P. Dorsey, J. Kaplan, R. Cahn)—Viet-Nam
12/ 2/76	JUDGMENT That this action is dismissed with prejudice and without costs to either party. (4-71 Civ. 435; 4-71 Civ. 402)—Viet-Nam.
2/27/76	Notice of Appeal (Notice is hereby given that the Republic of Vietnam, plaintiff above named, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the order of this Court dismissing the above action with prejudice and without cost to either party entered in this action on the second day of December, 1976.) (Mailed copies: R. Cahn, P. Owens, P. Sprenger, P. Dorsey, J. Kaplan) (Mailed certified copy of Notice of Appeal together with two certified copies of the docket entries to Clerk, U.S. Court of Appeals, St. Louis, MO 63101) (4-71 Civ. 435; 4-71 Civ. 402)—Viet-Nam.

Defendants' Notice of Motion to Dismiss Complaint of the Republic of Vietnam, March 12, 1971.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

M 19-93A
and the following action:
70 Civ. 877

In Re Coordinated Pretrial Proceeding in Antibiotic Antitrust Actions

THE REPUBLIC OF VIET-NAM,

Plaintiff,

v.

CHAS. PFIZER & CO., INC., et al.,

Defendants.

Notice of Motion

SIRS:

PLEASE TAKE NOTICE THAT on March 16, 1971 at 10:00 o'clock in the forenoon, at the United States Court House in San Francisco, or at such other time or place as may be fixed by the Court, the defendants upon the complaint, the attached affidavits and all prior proceedings herein will move the Court for an Order pursuant to Fed. R. Civ. P. 12(b)(6) dismissing the complaint of the Republic of Viet-Nam for failure to state a claim upon which relief can be granted on the ground that plaintiff

Notice of Motion

has no cause of action under Section 4 of the Clayton Act (15 U.S.C. § 15).

Dated: New York, New York
March 12, 1971

Respectfully submitted,

DONOVAN LEISURE NEWTON & IRVINE
Two Wall Street
New York, New York 10005
Attorneys for American Cyanamid Company

Of Counsel:
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Notice of Motion

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Attorneys for
The Upjohn Company

To:

PERRY GOLDBERG, ESQ.
208 So. LaSalle Street
Chicago, Illinois 60604

[Affidavit and exhibits omitted in printing.]

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District Court's Memorandum and Order, May 26, 1971, Denying Defendants' Motion to Dismiss the Action of the State of Kuwait.

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

M-19-93A and the following action: 69 Civ. 4091

In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions

STATE OF KUWAIT, et al.

v.

CHAS. PFIZER & Co., et al.

MISCELLANEOUS ORDER NO. 71-13

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This action is one of more than sixty so-called non-settling antibiotic drug cases which have been assigned to the undersigned judge for coordinated or consolidated pretrial proceedings pursuant to section 1407. *In re Antibiotic Drug Cases*, 320 F. Supp. 586 (JPML 1971). It is brought by Kuwait, a foreign sovereign, seeking treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15, resulting from its purchases of broad spectrum antibiotic drugs

manufactured and sold by the defendants. The defendants have moved to dismiss "for failure to state a claim upon which relief can be granted on the ground that the plaintiff, as a foreign sovereign government, has no cause of action under section 4 of the Clayton Act."[1] The issue, simply stated, is whether a foreign nation is a "person" within the meaning of our antitrust laws.[2]

While it may be simply stated, the question is of great importance and is apparently one of "first impression."[3] While the parties agree that Congressional intent controls, there is little of relevance to be garnered from the legislative history of the Sherman and Clayton Acts and no reported decision has been found which squarely faces this issue.

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1. A similar motion was filed in the *Republic of Viet Nam Case* but it raises additional issues not involved in this case, which will be dealt with separately. To the extent applicable, the Court's holding here will apply with equal force and effect to the *Viet Nam Case.*

2. 15 U.S.C. §§ 7 and 12.

3. The plaintiffs and the United States, as *amicus curiae,* contend that the Republic of India was allowed to maintain a treble damage action in the *Electrical Equipment Co. Cases.* It is true that the counsel for the defendants indicated that he had "the job of convincing the Court that India is not a person under the antitrust laws." (Transcript of June 18, 1963, p. 139). However, the "named plaintiff" was the Damodar Valley Corporation, an Indian corporation although the defendants argued that it wasn't a bona fide corporation but was "the Republic of India acting in the guise of a corporation." (Transcript, p. 144). The plaintiff's position was simply that since the Damodar Valley Corporation was a corporation organized and existing under Indian law, it was clearly a "person" under sections 7 and 12. (Transcript, p. 156). The basis for the Court's decision overruling defendants' motion to dismiss was not elucidated and cannot, under the circumstances, be relied on as authority for the plaintiff's position in this case.

All parties agree that the relevant case law is essentially limited to two Supreme Court decisions: *United States* v. *Cooper Corp.,* 312 U.S. 600 (1941) and *Georgia* v. *Evans,* 316 U.S. 159 (1942). In *Cooper,* the Supreme Court held that the United States could not maintain a treble damage action under the Sherman Act (thus leading Congress to amend the Act to allow the United States to sue for single damages) while in *Georgia,* the Court held that a state could recover treble damages under section 4 although it was not included in the statutory definition of persons entitled to maintain treble damage actions.[4]

The plaintiffs and the United States, as *amicus curiae,* argue that the rationale of *Georgia* should apply to foreign nations while the defendants argue that the *Cooper* decision is applicable to them. The plaintiffs rely on a long line of cases which allow foreign sovereigns to maintain actions in United States Courts. The United States, as *amicus,* argues persuasively that foreign nations, as a matter of good foreign policy, should be given the protection of our antitrust laws. But the real question, as this Court perceives it, is whether the maintenance of this action is essential to the effective enforcement of the antitrust laws. The Court believes that it is and the motion will be denied.

The decisions of the United States Supreme Court have consistently given vitality and strength to the private enforcement of our antitrust laws. As the Second Circuit

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4. The Sherman and Clayton Acts both define such person as including "any corporation and association existing under or authorized by the laws of either the United States, the laws of any of the territories, the laws of any state, or the laws of any foreign country." 15 U.S.C. §§ 7 and 12.

recently pointed out "the most important thing to keep in mind is the *result orientation* with which the Court has approached the whole area of private treble-damage litigation." *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, —— F.2d —— (2d Cir. 1971) (Emphasis Added.)

A conspiracy among domestic producers of antibiotic drugs to reduce or eliminate competition as to foreign sales would certainly have an adverse effect on domestic competition. Not only would it enable the domestic manufacturers to build up a substantial "war chest" from excessive profits from foreign sales but it undoubtedly would prevent either a domestic or foreign manufacturer from entering into the foreign market in order to build up its strength to enter into the restricted domestic market. In an age of expanding world trade, a truly successful domestic monopoly requires control of the foreign market as well. For these reasons, this Court is convinced that the fundamental goal of the antitrust laws could be seriously frustrated by not permitting Kuwait to maintain a treble damage action for damages resulting from the alleged conspiracy.

As the Supreme Court could "perceive no reason for believing that Congress wanted to deprive a state, or purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other (domestic) purchasers who suffer through violation of the Act," *Georgia* v. *Evans*, 316 U.S. at 162, this Court can perceive no reason for believing that Congress wanted to deprive a foreign nation, as purchaser of commodities shipped in foreign commerce, of the civil remedy of treble damages which is available to other foreign purchasers who suffer through violation of the Act.

IT IS THEREFORE ORDERED that defendants' motion to dismiss be and the same is hereby denied.

This Court is of the opinion that this order involves an important and controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation. 28 U.S.C. § 1292(b).

/s/ MILES W. LORD
Miles W. Lord
United States District Judge
Southern District of New York
By Assignment

Dated: May 24, 1971

Motion of Republic of the Philippines, June 19, 1972, to Strike Defendants' Affirmative Defense as to Foreign Governments' Lack of Standing to Sue For Treble-Damages Under the Antitrust Laws.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

4-71 Civ. 435
In Re Coordinated Pretrial Proceedings
in Antibiotics Antitrust Actions

Dist. of Columbia Civil Action
No. 650-72

THE REPUBLIC OF THE PHILIPPINES
BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,
Plaintiff,

v.

PFIZER, INC.; AMERICAN CYANAMID COMPANY; BRISTOL-MYERS COMPANY; SQUIBB, INC.; E. R. SQUIBB AND SONS, INC.; OLIN CORP.; AND THE UPJOHN COMPANY,
Defendants.

MOTION TO BRING THE PHILIPPINES ACTION WITHIN THE PURVIEW OF MISCELLANEOUS ORDER 71-13, OR, ALTERNATIVELY TO BRING CERTAIN DEFENSES ON PROMPTLY FOR PRELIMINARY HEARING AND DETERMINATION AS PROVIDED BY RULE 12(d); OR, ALTERNATIVELY, TO STRIKE CERTAIN OF THE DEFENDANTS' AFFIRMATIVE DEFENSES.

Motion of Republic of the Philippines, June 19, 1972, to Strike Defendants' Affirmative Defenses as to Foreign Governments' Lack of Standing to Sue For Treble-Damages Under the Antitrust Laws.

Plaintiff moves this Court for an order declaring plaintiffs' action to be within the purview of Miscellaneous Order 71-13, which established that foreign governments have standing to bring suit under the applicable antitrust statutes of the United States for the purpose of recovering treble the damages attributable to violations of the antitrust statutes.

In the first alternative, Plaintiff moves for an immediate determination, as contemplated by Rule 12(d) of the Federal Rules of Civil Procedure, of the issues raised by defendants' affirmative defenses relating to the standing of a foreign government to maintain an action for damages under the antitrust laws of the United States; specifically, the affirmative defense designated "First", by Pfizer, Inc.; "C" by American Cyanamid Company; Paragraph "83" by Bristol-Myers Company; and "Third" by Squibb, Inc., E. R. Squibb and Sons, Inc., and Olin Corporation.

In the second alternative, Plaintiff moves to strike the affirmative defenses relating to the standing of a foreign government to maintain an action for damages, under the antitrust laws of the United States, specifically, the affirmative defenses designated "First" by Pfizer, Inc.; "C" by American Cyanamid Company; Paragraph "83" by Bristol-Myers Company; and 'Third" by Squibb, Inc., E. R. Squibb and Sons, Inc. and Olin Corporation.

Dated: Monday, June 19, 1972

LUCAS, O'CONNELL, FRIEDMAN & MANN
Joseph B. Friedman

HOLLABAUGH & JACOBS
Douglas V. Rigler

[Certificate of service omitted in printing.]

Complaint of the Imperial Government of Iran, February 6, 1974.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions

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No. 4-74-65

JURY TRIAL DEMANDED

THE IMPERIAL GOVERNMENT OF IRAN,

Plaintiff,

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., and E. R. SQUIBB AND SONS, INC.

Defendants.

Complaint

Plaintiff, The Imperial Government of Iran, appearing herein by its attorneys, brings this Complaint against Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc., and E. R. Squibb and Sons, Inc.

I

JURISDICTION AND VENUE

1. The jurisdiction of this Court to hear this Complaint is based upon the original jurisdiction of the Court to hear

"any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies," and, as herinafter set forth, this controversy involves Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Act of July 2, 1890, Ch. 647, §§ 1 and 2, 26 Stat. 209, as amended; and Sections 1, 4, 5, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15, 16, 22 and 26), Act of October 15, 1914, Ch. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, as amended. Plaintiff sues for appropriate injunctive relief and to recover treble damages which Plaintiff and the classes it represents have sustained because of the violations by Defendants of the above cited statutes, plus costs of suit and reasonable attorneys' fees.

2. Each Defendant maintains an office, transacts business, is found, or has an agent within this district.

II

PLAINTIFF

3. Plaintiff, the Imperial Government of Iran (hereinafter referred to as Iran) is a sovereign foreign state with whom the United States of America maintains diplomatic relations.

4. Plaintiff, and Plaintiff's departments, agencies, commissions, institutions, instrumentalities and subdivisions, has purchased, directly and indirectly, substantial amounts of broad spectrum antibiotics and broad spectrum antibiotic products during the period in suit in transactions arising out of the foreign and/or interstate commerce of the United States of America.

III

Capacities in Which Plaintiff Sues

5. Plaintiff, on its own behaif and on behalf of its departments, agencies, commissions, institutions, instrumentalities and subdivisions, maintains this action as a direct and indirect purchaser of broad spectrum antibiotics and broad spectrum antibiotic products (hereinafter BSA and BSAP).

6. Plaintiff maintains this action as the representative of a class consisting of political subdivisions in Iran which purchased BSA and BSAP.

7. Plaintiff maintains this action as the representative of a class consisting of individual purchasers and consumers in Iran who purchased and consumed BSA and BSAP.

8. Plaintiff maintains this action as the representative of a class consisting of hospitals and clinics in Iran which purchased BSA and BSAP.

9. Plaintiff maintains this action as the representative of a class consisting of importers, distributors, retailers and wholesalers in Iran who purchased BSA and BSAP.

10. Plaintiff maintains this action, in a *parens patriae* and proprietary capacity, for damages to its proprietary, commercial and business interests, including loss of foreign exchange, arising from purchases of BSA and BSAP.

11. Plaintiff maintains this action, in a *parens patriae* capacity, for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers and importers in Iran who purchased BSA and BSAP.

12. Plaintiff maintains this action as the representative of the pharmacists of Iran.

13. Each of the above-mentioned classes is so numerous that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the Government of Iran, as the representative of each class, are typical of the claims of each class. And the Government of Iran will fairly and adequately represent each class.

14. This action will be dispositive of the interests of the members of the above-mentioned classes.

15. The questions of law and fact common to the members of each class predominate over questions involving only individual members, and a class action is superior to other available methods for the fair and efficient resolution of the controversy.

IV

Defendants

16. Defendant Pfizer, Inc. (hereinafter Pfizer) is a corporation organized and existing under the laws of the State of Delaware with principal offices located in New York, New York. Pfizer is the successor to and was formerly known as and transacted business under the name of Chas. Pfizer & Co., Inc. Pfizer is and was engaged in the manufacture, sale, and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including Iran. In its international manufacturing and sales activities, Pfizer sometimes operates and conducts business

through wholly or substantially owned foreign or domestic subsidiaries.

17. Defendant American Cyanamid Company (hereinafter Cyanamid) is a corporation organized and existing under the laws of the State of Maine with principal offices located in New York, New York. Cyanamid is and was engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including Iran. In its international manufacturing and sales activities, Cyanamid sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

18. Defendant Bristol-Myers is a corporation organized and existing under the laws of the State of Delaware whose principal offices are located in New York, New York. The activities of Bristol-Myers in the pharmaceutical field are carried on by Bristol Laboratories Division. Prior to December 1959, the business and assets of the Bristol Laboratories Division were operated as a wholly owned subsidiary of Bristol-Myers Company. Defendant Bristol-Myers Company and Bristol Laboratories, Inc., are hereinafter severally and jointly referred to as "Bristol" unless otherwise indicated. Bristol is and was engaged in the manufacture, sale and distribution of various drug products including BSA and BSAP, which business is conducted in the United States and throughout the world, including Iran. In its international manufacturing and sales activities, Bristol sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

19. Defendant Upjohn Company (hereinafter Upjohn) is a corporation organized and existing under the laws of the State of Michigan with principal offices located in Kalamazoo, Michigan. Upjohn was and is engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including Iran. In its interational manufacturing and sales activities, Upjohn sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

20. Olin Corporation is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal offices located in New York, New York. Olin is the successor to, and formerly was known as and transacted business under the name Olin Mathieson Chemical Corporation. Until approximately January 1968, Olin was engaged in the manufacture, sale and distribution of various drug products, including BSA, which business was conducted in the United States and throughout the world, including Iran. In its international manufacturing and sales activities, Olin sometimes operated and conducted business through wholly or substantially owned foreign or domestic subsidiaries.

21. Squibb, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices and place of business located at 460 Park Avenue, New York, New York.

22. E. R. Squibb & Sons, Inc. (sometimes hereinafter referred to as Squibb) is a corporation organized and exist-

ing under the laws of the State of Delaware, with its principal office and place of business located in New York, New York. E. R. Squibb & Sons, Inc., is a wholly owned subsidiary of Squibb, Inc., and is engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, in the United States and throughout the world, including Iran. Prior to approximately January 1, 1966, the business and assets of E. R. Squibb & Sons, Inc., were operated as the Squibb Division of the defendant Olin. Effective January 1, 1966, Olin transferred all assets and liabilities relating to its pharmaceutical operations to E. R. Squibb & Sons, Inc., a wholly owned subsidiary. In September 1967, Olin and Beech-Nut Life Savers, Inc. (Beech-Nut) agreed upon a merger of E. R. Squibb & Sons, Inc., and Beech-Nut. In anticipation of the merger, Olin transferred all the capital stock of its subsidiary E. R. Squibb & Sons, Inc., in exchange for all of the stock of Squibb, Inc., a corporation newly organized for purposes of effectuating the merger. Immediately prior to the merger, Olin distributed its entire interest in Squibb, Inc., to Olin's stockholders on a pro rata basis. On January 15, 1968, Beech-Nut was merged into Squibb Enterprises, Inc., a wholly owned subsidiary of Squibb, Inc., and the stockholders of Beech-Nut received shares of Squibb, Inc., in exchange for their stock. The name of Squibb, Inc., was changed to Squibb Beech-Nut, Inc., which on April 30, 1971, changed it name to Squibb, Inc. Squibb, Inc., operates through four major subsidiaries: E. R. Squibb & Sons, Inc.; Beech-Nut, Inc.; Dobbs House, Inc.; and Lanvin-Charles of the Ritz, Inc. As a result of these transactions, the assets formerly held by E. R. Squibb & Sons, Inc., the Olin subsidiary, are now held by the defendant E. R. Squibb & Sons, Inc., which is a newly organized, wholly owned subsidiary of Squibb, Inc. In its international manufacturing and sales activities, Squibb sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

V

Definitions

23. As used herein:

a. The term "antibiotics" means chemical substances produced by a microorganism, or by chemical synthesis, which have the capacity to inhibit the growth of other harmful microorganisms or to destroy them.

b. The term "broad spectrum antibiotics" (sometimes herein referred to as BSA) means antibotics which are effective against a wide range of harmful microorganisms, including gram positive and gram negative pathogenic microorganisms, rickettsiae, viruses, spirochetes and protozoa. BSA includes tetracycline, chlortetracycline, oxytetracycline, doxycycline, minocycline, demeclocycline and methacycline.

c. The term "Tetracycline" means the generic name of the broad spectrum antibiotic whose chemical name and structure are 4-dimethylamino—1, 4, 4a, 5, 5a, 6, 11, 12a—octahydro—3, 6, 10, 12, 12a—pentahydroxy—6, methyl—1, 11—dioxo—2 napthacene carboxamide and salts, hydrates, esters, complexes and analogs thereof.

d. The term "Aureomycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Cyanamid whose generic name is chlortetracycline, and salts and analogs thereof.

e. The term "Terramycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Pfizer, whose generic name is oxytetracycline, and salts and analogs thereof.

f. The term "Chloromycetin" means the brand name of the broad spectrum antibiotic manufactured and sold by Parke, Davis & Co., whose generic name is chloramphenicol.

g. The term "Products" shall mean any product in the form in which it is sold to retail and wholesale sellers of drugs, hospital, surgical and dental supply houses, doctors, dentists, hospitals, clinics, and government agencies and government institutions, or any one of them. "BSAP" as hereinafter sometimes used shall mean broad spectrum antibiotic products.

h. The term "bulk form" means the chemical form in which a pharmaceutical product is manufactured but which requires packaging in dosage form so as to render it suitable for sale to the drug trade and dispensing to the ultimate consumer.

VI

Nature of Trade and Commerce

24. BSAP are widely used by the medical profession in the treatment of human infectious diseases. They are effective against a wide range of infectious diseases. BSA

are used and sold throughout the world and are regularly shipped within and from the United States in interstate and foreign commerce.

25. During most of the period covered by this Complaint, the BSAP market consisted of (a) Aureomycin, (b) Terramycin, (c) Tetracycline, and (d) Chloromycetin. All four are effective against substantially the same range of pathogenic microorganisms and are substantially interchangeable in medical use. Aureomycin, Terramycin and Chloromycetin have closely similar molecular structures.

26. The first broad spectrum antibiotic sold in the United States was chlortetracycline. Since December 1948, Cyanamid has marketed this product under the trade name "Aureomycin". On September 14, 1949, Cyanamid, as the assignee of the Duggar application, received U.S. Patent No. 2,482,055 on "Aureomycin and the preparation of same." On September 2, 1952, Cyanamid, as the assignee of the Niedercorn application, received U.S. Patent No. 2,609,329, which was an improvement patent on the process for producing Aureomycin.

27. On October 4, 1949, Parke, Davis & Co. received U.S. Patent No. 2,483,885 on the broad spectrum antibiotic chloramphenicol; and since 1949 it has marketed the product under the trade name Chloromycetin.

28. On July 18, 1950, Pfizer received U.S. Patent No. 2,516,080 on the broad spectrum antibiotic oxytetracycline; and since 1950 it has marketed the product under the trade name of Terramycin.

Complaint of the Imperial Government of Iran, February 6, 1974.

29. On January 11, 1955, Pfizer, as assignee of the Conover application, received U.S. Patent No. 2,699,054 on the broad spectrum antibiotic Tetracycline.

30. Tetracycline is manufactured by one of two principal methods: (1) a process which subjects chlortetracycline to hydrogenation in the presence of a catalyst which removes the chlorine atom from the molecule, and (2) by a direct fermentation process. At the outset of their manufacture of Tetracycline and for a substantial period of time thereafter, Pfizer and Cyanamid used the hydrogenation process while Bristol used the direct fermentation process.

31. During much of the period covered by this Complaint, Tetracycline was manufactured only by Pfizer, Cyanamid and Bristol. In the United States, Tetracycline was not manufactured by any manufacturer other than Pfizer, Cyanamid and Bristol until late in 1962.

32. Cyanamid has been licensed by Pfizer to manufacture and sell Tetracycline since the issuance of the Conover patent on January 11, 1955. Bristol has been licensed by Pfizer to manufacture and sell Tetracycline since March 28, 1956. Upjohn and Squibb have been licensed to sell some Tetracycline products since March 28, 1956, pursuant to the terms of an agreement between each of them and Pfizer.

33. For a substantial portion of the time covered by this Complaint, Tetracycline products were sold in the U.S. and abroad only by Pfizer, Cyanamid, Bristol, Upjohn and Squibb. Cyanamid commenced selling Tetracycline products in November 1953; Pfizer, in January 1954; Bristol, in April 1954; Squibb in September 1954; and Upjohn in October 1954.

Complaint of the Imperial Government of Iran, February 6, 1974.

34. For many years commencing in 1954, Upjohn and Squibb purchased all their bulk Tetracycline from Bristol, which, for a substantial period of time covered by this Complaint, was the only seller of bulk Tetracycline.

35. Each of the defendant companies sells Tetracycline products under its own brand or trade name. All use substantially identical dosage forms. The introductory brand names used by Defendants for their Tetracycline products were Cyanamid's "Achromycin"; Pfizer's "Tetracyn"; Bristol's "Polycycline"; Squibb's "Steclin"; and Upjohn's "Panmycin".

36. Cyanamid did not license anyone to manufacture and sell Chlortetracycline in the U.S., and for many years it limited its licenses abroad to its subsidiary companies.

37. Pfizer did not license anyone to manufacture and sell oxytetracycline in the U.S. and limited its license abroad to its subsidiary companies.

38. Parke, Davis & Co. did not license anyone to manufacture and sell chloramphenicol in the U.S. and limited its licenses abroad to its subsidiary companies.

39. As a result, Cyanamid, Pfizer and Parke, Davis enjoyed a monopoly on the production and sale of their respective BSA in the United States.

40. Cyanamid and Pfizer each applied for and obtained foreign counterpart patents for chlortetracycline and oxytetracycline respectively and Pfizer for tetracycline and each company sought and received many foreign counterpart patents for improvements and process patents for the

manufacture of these drugs and other subsequently developed BSA.

41. Bristol applied for and received foreign counterpart patents for the production or process or manufacture of certain BSA or BSAP; and in certain foreign countries Bristol obtained a product patent on Tetracycline, notwithstanding its failure to obtain such a patent in the United States.

42. As a result of obtaining the aforesaid U.S. and foreign counterpart patents and their policy not to license others to manufacture or sell these BSA, Pfizer, Cyanamid, Bristol, and Parke, Davis enjoyed a monopoly on the production and sale of these antibiotics throughout much of the world.

43. Tetracycline is the most widely used broad spectrum antibiotic. In the United States sales of Tetracycline products in 1954 amounted to about $39,500,000. In 1957 these sales totaled approximately $114,000,000 and in 1959 the amount sold was $95,000,000.

44. BSAP are sold by Defendants to customers who are classified in the U.S. market as either retail druggists, wholesalers, private hospitals, tax-supported hospitals, or federal government agencies. All Defendants sell directly to these classifications except that Upjohn has not always sold directly to wholesalers.

45. Within the United States, prices of all BSAP remained substantially unchanged from October 1951 to at least July 1960 to the retailer, wholesaler and hospital classifications.

46. International pricing and sales policies for BSA and BSAP are coordinated and controlled by each Defendant's respective management within the United States. Sales and price policies of Defendants' overseas subsidiaries engaged in the manufacture or sale of BSA or BSAP are reviewed by each Defendant's respective management within the United States and are subject to the control of management within the United States.

47. Patent licensing agreements and bulk sales agreements between Defendants and manufacturers or sellers of BSA and BSAP outside of the United States are reviewed and approved by each Defendants' respective management within the United States. Such agreements relating to BSA and BSAP are frequently negotiated within the United States.

48. Substantial quantities of BSA and BSAP manufactured by Defendants in the United States have been sold and shipped to customers outside of the United States, including customers in Iran.

49. Some BSA and BSAP purchased from the Defendants by customers in Iran may have been manufactured outside of the United States by Defendants' wholly or partially owned subsidiaries.

50. Some BSA and BSAP purchased by customers in Iran may have been manufactured outside of the United States by licensees of Defendants. Such licensees pay or paid royalties to Defendants based upon the use of Defendants' U.S. BSA patents and their foreign counterparts. These patents include but are not limited, to the foreign

counterpart patents of U.S. Patent No. 2,600,054 (Conover); U.S. Patent No. 2,482,055 (Duggar); U.S. Patent No. 2,609,329 (Niedercorn); U.S. Patent No. 2,734,018 (Minieri); U.S. Patent No. 3,092,556; Reissue RE 25,840 (Growich).

VII

Background of the Conspiracy

51. In 1952 Pfizer's Terramycin product sales in the United States totaled over $39,000,000. Cyanamid's Aureomycin product sales in the United States totaled over $38,000,000. These sales amounted to approximately 78 percent of the broad spectrum product market in 1952.

52. In 1953 Pfizer's Terramycin product sales in the United States totaled over $36,500,000. Cyanamid's Aureomycin product sales in the United States were about $32,000,000. These sales amounted to approximately 92 percent of the broad spectrum product market in 1953.

53. As of November 1953, prices of the narrow spectrum antibiotics such as penicillin and streptomycin, which were not patented and were sold by numerous companies, were severely depressed. Each of the defendant companies engaged or had been engaged in the manufacture or sale of such narrow spectrum antibiotics.

54. As of November 1953, Bristol Laboratories, Inc., a then wholly owned subsidiary of Bristol (and presently an operating division thereof) was operating at a loss by reason of the continued decline in the sales price of penicillin which then constituted the major part of the total business of Bristol Laboratories, Inc.

55. As of November 1953, prices of the BSAP then on the market, all patented, were all substantially identical and non-competitive, and had all been maintained at the price level in effect on October 1, 1951.

56. As of November 1953, patent applications on Tetracycline, filed in 1953 by Pfizer, Cyanamid and Bristol severally, were pending in the Patent Office. Pfizer's pending application was a continuation of a previous application rejected by the Patent Office.

57. On September 23, 1953, Heyden Chemical Company filed an application for a patent on Tetracycline. This application was acquired by Cyanamid in December 1953 after arrangements for its acquisition had been completed in November 1953.

58. On or about October 29, 1953, Pfizer and Cyanamid were informed by the Patent Office that an interference would probably be declared on their respective Tetracycline patent applications.

59. By October 1953, Pfizer knew that Cyanamid was interested in Tetracycline and was testing it clinically. Cyanamid also knew then that Pfizer was interested in Tetracycline.

60. As of November 1953, Pfizer and Cyanamid knew that Tetracycline was directly competitive with Terramycin and Aureomycin respectively, and that Tetracycline represented a threat to the continuation of their dominant positions and high profits in the then existing BSAP market. Pfizer and Cyanamid also knew that unless one of them could obtain a product patent on Tetracycline, prices of the BSAP could become competitive.

61. In 1954, Bristol had a very small sales force selling pharmaceuticals directly to the drug trade. Upjohn and Squibb, at such time, each had a very large sales force engaged in the direct sale of pharmaceuticals to the drug trade.

62. Prior to the introduction of Tetracycline products, Cyanamid was manufacturing and selling Aureomycin, ostensibly pursuant to coverage under the Duggar and Niedercorn patents and Cyanamid purportedly had the ability to exclude other companies from the Aureomycin market through the assertion of these patents. In applying for these patents and during the processing of these patent applications, Cyanamid did not disclose the best known mode and manner of its invention and thereby obtained these patents by knowing and willful non-compliance with Patent Office requirements. Accordingly, there is substantial reason to believe that these patents are invalid and unenforceable.

63. Cyanamid's Growich and Minieri patent applications did not conform with Patent Office rules and standards which may render these patents invalid and unenforceable.

VIII

Violations of Law

64. Beginning in or about November 1953, the exact date being unknown to Plaintiff, the Defendants have engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture, sale and distribution of BSA and BSAP, have combined and

conspired to monopolize such interstate and foreign trade and commerce and have attempted to monopolize and monopolized such trade and commerce, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The substantial terms of the aforesaid violations have been and are that:

a. The manufacture of Tetracycline be confined to Pfizer, Cyanamid and Bristol in the United States and to a limited number of licensees abroad.

b. The sale of Tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb in the United States and to a limited number of licensees abroad.

c. The sale of bulk Tetracycline be confined to Bristol and bulk Tetracycline be sold by Bristol only to Upjohn and Squibb in the United States and Defendants' bulk sales abroad would be to a limited and controlled number of customers.

d. The sale of BSAP by the defendant companies, their subsidiaries and their licensees and/or bulk customers in the United States and abroad be at substantially identical and non-competitive prices.

65. Pfizer, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Tetracycline, in the United States and abroad; further, Pfizer, in reliance on said patent position, has engaged in acts in restraint of

domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Tetracycline market.

66. Cyanamid, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Chlortetracycline, in the United States and abroad; further, Cyanamid, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Chlortetracycline market.

67. The said violations have been effectuated by various means and methods including, but not limited to, those alleged in paragraphs 69 through 91 of this Complaint.

68. Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other domestic and most foreign applicants.

69. Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other domestic and most foreign applicants.

70. Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline.

71. Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent.

72. Pfizer, Cyanamid and Bristol withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

73. Cyanamid acquired the competing Heyden patent application on Tetracycline and abandoned the product claims therein.

74. Bristol sold bulk Tetracycline only to Upjohn and Squibb. For a substantial period of time covered by this Complaint, each of the defendant companies refused to sell bulk Tetracycline to all others except that Cyanamid sold a large amount of bulk Tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the Tetracycline product market.

75. Bristol entered into agreements with Upjohn and Squibb, respectively, which requested Upjohn and Squibb to purchase all their requirements of bulk tetracycline from Bristol.

76. Pfizer issued licenses to Upjohn and Squibb, respectively limited, however, at Bristol's request to the sale of Tetracycline products.

77. Pfizer and Cyanamid have maintained substantially identical, non-competitive prices on Terramycin products and Aureomycin products, respectively.

78. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terra-

mycin products and Aureomycin products in effect as of November 1953, and all these companies thereafter maintained such substantially identical, non-competitive prices.

79. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications.

80. Defendants have communicated with one another and advise one another both in the United States and throughout the world with respect to current and future prices of BSAP.

81. Defendants have jointly sought to restrict or inhibit the purchase of BSA and BSAP which were not manufactured by one of the Defendants.

82. Defendants have consulted with respect to action to inhibit or foreclose the purchase of BSA and BSAP in their generic form and have jointly acted to inhibit or foreclose such purchases.

83. Defendants have jointly agreed as to which patents on BSA and BSAP would be maintained on a worldwide (country-by-country) basis.

84. Defendants have advised and consulted with each other with respect to which of them would bring patent infringement actions or threaten such actions and under which patent relating to BSAP such legal action or threat

of legal action would be based in order to prevent the sale of BSA or BSAP by companies other than the Defendants or their licensees.

85. Defendants have threatened to bring and have brought legal actions to prevent the sale of BSA or BSAP by persons other than Defendants or their licensees notwithstanding Defendants' knowledge that patents relied upon in such lawsuits were fraudulently obtained or were being misused.

86. Defendants have entered into understandings, express or implicit, among themselves and their licensees that certain Defendants or certain of their licensees would not compete in some markets or areas of the world.

87. Defendants have established or attempted to establish worldwide or area prices concerning and governing the sale of BSAP.

88. Defendants have knowingly disparaged the quality of competitive products and have sought to convince prospective customers that competitive BSAP were inferior notwithstanding Defendants' knowledge of the falsity of such assertions or statements.

89. Defendants have purchased or atempted to purchase additional fermentation capacity or entered into bulk purchase contracts with other fermenters thus giving them control over competitive fermentation capacity for BSA and BSAP.

90. Defendants have sold BSA and BSAP on the express or implicit understanding that such products would not be re-exported in any form outside of the country in which they were originally sold.

IX

Effects of the Violations

91. The violations hereinbefore alleged have had the following effects on interstate and foreign commerce, among others:

a. Iran and its political subdivisions, individual consumers, hospitals and clinics, retailers, wholesalesalers and importers in Iran, have all been deprived of the benefits of competition and have been compelled to pay high, non-competitive prices for BSA and BSAP.

b. Iran has been deprived of vital foreign exchange reserves because excessive amounts of foreign exchange have been required not only to pay for BSA and BSAP at the non-competitive prices charged by Defendants or their licensees but also to enable Defendants or their licensees to make remittances from Iran, in United States dollars or other foreign currencies, of their profits resulting from sales in the RVN of BSA and BSAP at the non-competitive prices charged by them.

c. Pfizer and Cyanamid have been able to maintain unchanged for prolonged periods their substantially identical, non-competitive, high prices of Terramycin products and Aureomycin products without any price competition from Tetracycline products.

d. Pfizer, Cyanamid, Bristol, Upjohn and Squibb have been able to maintain unchanged for prolonged

periods substantially identical, non-competitive, high prices of all BSA and BSAP sold by them, and price competition in the sale and distribution of BSA and BSAP has been prevented and suppressed.

e. Pfizer, Cyanamid, and Bristol, Squibb and Upjohn have been able to make non-competitive, high profits from the sale of their BSAP.

f. Bristol has been able to make non-competitive, high profits in the sale of bulk Tetracycline.

g. A judicial determination of the validity of Pfizer's Tetracycline patent has been prevented.

h. Introduction of improved forms and methods of administration of BSA by other companies has been restricted and prevented and research in this field has been hampered.

i. Pharmaceutical companies other than the defendant companies desiring to engage in the manufacture or sale of BSA or BSAP have been prevented and precluded from doing so.

j. Other producers and sellers of BSA and BSAP have been precluded from effectively competing in Iran.

X

Judgments in Governmental Proceedings

92. On July 28, 1958, the Federal Trade Commission issued a Complaint against Pfizer, Bristol, Cyanamid, Squibb and Upjohn, charging, *inter alia*, that Pfizer made

false, misleading and incorrect statements to, and withheld material information from, the United States Patent Office for the purpose and with the effect of inducing the issuance of a patent on Tetracycline. *In the Matter of American Cyanamid Co., et al.*, F.T.C. Docket No. 7211. The Complaint also alleged that Bristol and Cyanamid withheld from the Patent Office material information in the course of the prosecution of patent applications, as a result of which Pfizer was aided in obtaining its Tetracycline patent. It was further alleged that Cyanamid, Bristol, Squibb and Upjohn solicited and accepted licenses from Pfizer under the Tetracycline patent, knowing that material information had been withheld from the Patent Office by one or more of the Defendants. The Complaint further alleged that all five Defendants conspired and combined to fix and maintain prices of BSA, including Tetracycline. On September 29, 1967, the Federal Trade Commission found that Pfizer had obtained the Tetracycline patent by material misrepresentation to, and withholding pertinent information from, the Patent Office; that Pfizer had attempted to monopolize Tetracycline; and that Cyanamid had also withheld material information from the Patent Office in connection with the issuance of the Tetracycline patent. The Commission found that Pfizer's conduct violated Section 2 of the Sherman Act and was therefore a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission further found that Cyanamid's conduct also violated Section 5 of the Federal Trade Commission Act. The Commission issued a final order directing Pfizer and Cyanamid to make licenses under their patents on Tetracycline and Aureomycin available to all other

domestic companies on a specified royalty basis. On September 30, 1968, the United States Court of Appeals for the Sixth Circuit affirmed the decision and order of the Federal Trade Commission. *Charles Pfizer & Co.* v. *F.T.C.*, 401 F.2d 574 (6th Cir. 1968). Plaintiff's action is based in part upon the matters complained of and determined in this proceeding.

93. On August 17, 1961, the United States of America instituted a criminal prosecution, 61 Cr. 772, in the United States District Court for the Southern District of New York, naming Pfizer, Cyanamid and Bristol as defendants, and Squibb and Upjohn as co-conspirators. The three-count indictment alleged the same combination and conspiracy to restrain trade and to monopolize and monopolization which are the subject matter of the present action. On December 29, 1967, after a jury trial, defendants Pfizer, Cyanamid and Bristol were each found guilty of each of the violations charged. Judgments of conviction were entered and maximum fines imposed on February 28, 1968. On January 28, 1972, an equally divided Supreme Court affirmed an order of the Second Circuit, 437 F.2d 957, affirming 426 F.2d 32, that a new trial was required due to errors in the jury charge delivered by the District Court. Plaintiff's action is based in part upon the matters charged in this proceeding. On or about December 1, 1973, following a retrial, the criminal charges against Defendants were dismissed.

XI

Fraudulent Concealment

94. Plaintiff had no knowledge of the violations alleged herein or of the facts which might have led to the discovery of the violations, until after the institution of the litgation referred to in paragraphs 92 and 93. Plaintiff could not have discovered the said antitrust violations at an earlier date by the exercise of due diligence, inasmuch as said antitrust violations had been fraudulently concealed from their inception by the Defendants by various means and methods used to avoid the detection thereof. Said fraudulent concealment consisted in part of the following acts: misrepresenting material facts and withholding pertinent information from the Patent Office; tightly controlling the dissemination of documents containing relevant data and subsequently destroying these documents.

95. During the pendency of the litigation referred to in paragraphs 92 and 93 and the fraudulent concealment referred to in paragraph 94, the statute of limitations applicable to the instant action (Clayton Act, Section 4(b), 15 U.S.C. § 15(b)) has been and continues to be suspended as provided by statute and otherwise. Clayton Act, Section 5(b), 15 U.S.C. § 16(b).

XII

Injury to Plaintiff

96. During the period of the Defendants' violations of the Sherman Act, Plaintiff and other members of the classes represented by Plaintiff purchased BSA and BSAP

from the Defendants and others. By reason of said violations, Plaintiff and other members of the classes represented by Plaintiff have been denied the benefits of unrestricted competition, and have paid more for BSA and BSAP than they would have paid had Defendants' violations not existed. As a result, Plaintiff and other members of the class it represents have been injured and damaged in their business or property by Defendants in an amount which presently is undetermined.

PRAYER

Wherefore, Plaintiff prays that:

(1) this Court adjudge and decree that the Defendants, and each of them, have combined and conspired to restrain and monopolize interstate and foreign trade and commerce in the manufacture, distribution and sale of BSA and BSAP; have each of them restrained such trade and commerce; and have monopolized and attempted to monopolize such trade and commerce as hereinbefore alleged, in violation of Section 1 and 2 of the Sherman Act;

(2) judgment be entered in favor of Plaintiff and the classes represented by Plaintiff against the Defendants, jointly and severally, for the injury and damage caused by Defendants in an amount threefold the actual damages sustained with interest thereon;

(3) this Court allow, and Defendants be required to pay, jointly and severally, the full costs of this suit, including as part thereof a reasonable fee for the services of Plaintiff's attorneys; and

Complaint of the Imperial Goverment of Iran, February 6, 1974.

(4) Plaintiff be granted such other, further, and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

Counsel for Plaintiff
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JURY DEMAND

Please take notice that Plaintiff demands a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

Amended Complaint of the Republic of Viet Nam, March 26, 1974.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
No. 4-71 Civ. 402
JURY TRIAL DEMANDED

In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions

THE REPUBLIC OF VIET-NAM,
Plaintiff,
v.
PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., and E. R. SQUIBB AND SONS, INC.,
Defendants.

Amended Complaint

Plaintiff, The Republic of Viet-Nam, appearing herein by its attorneys, brings this Complaint against Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc., and E. R. Squibb and Sons, Inc.

I

JURISDICTION AND VENUE

1. The jurisdiction of this Court to hear this Complaint is based upon the original jurisdiction of the Court to hear

"any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies," and, as hereinafter set forth, this controversy involves Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Act of July 2, 1890, Ch. 647, §§ 1 and 2, 26 Stat. 209, as amended; and Sections 1, 4, 5, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15, 16, 22 and 26), Act of October 15, 1914, Ch. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, as amended. Plaintiff sues for treble damages, plus costs of suit and reasonable attorneys' fees.

2. Each Defendant maintains an office, transacts business, is found, or has an agent within this district.

II

Plaintiff

3. Plaintiff, The Republic of Viet-Nam (hereinafter RVN), is a sovereign foreign state with whom the United States of America maintains diplomatic relations.

4. Plaintiff, and Plaintiff's departments, agencies, commissions, institutions, instrumentalities and subdivisions, has purchased, directly and indirectly, substantial amounts of broad spectrum antibiotics and broad spectrum antibiotic products during the period in suit in transactions arising out of the foreign and/or interstate commerce of the United States of America.

III

Capacities in Which Plaintiff Sues

5. Plaintiff, on its own behalf and on behalf of its departments, agencies, commissions, institutions, instrumentalities and subdivisions, maintains this action as a direct and indirect purchaser of broad spectrum antibiotics and broad spectrum antibiotic products (hereinafter BSA and BSAP).

6. Plaintiff maintains this action as the representative of a class consisting of political subdivisions in the RVN which purchased BSA and BSAP.

7. Plaintiff maintains this action as the representative of a class consisting of individual purchasers and consumers in the RVN who purchased and consumed BSA and BSAP.

8. Plaintiff maintains this action as the representative of a class consisting of hospitals and clinics in the RVN which purchased BSA and BSAP.

9. Plaintiff maintains this action as the representative of a class consisting of retailers and wholesalers in the RVN who purchased BSA and BSAP.

10. Plaintiff maintains this action, in a *parens patriae* and proprietary capacity, for damages to its proprietary, commercial and business interests, including loss of foreign exchange, arising from purchases of BSA and BSAP.

11. Plaintiff maintains this action, in a *parens patriae* capacity, for direct out-of-pocket damages suffered by

political subdivisions, individuals, hospitals, clinics, retailers, wholesalers and importers in the RVN who purchased BSA and BSAP.

12. Plaintiff maintains this action as the authorized representative of the Union of Pharmacists of Viet-Nam and of the members of said Union.

13. Each of the above-mentioned classes is so numerous that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the Government of the RVN, as the representative of each class, are typical of the claims of each class. And the Government of the RVN will fairly and adequately represent each class.

14. This action will be dispositive of the interests of the members of the above-mentioned classes.

15. The questions of law and fact common to the members of each class predominate over questions involving only individual members, and a class action is superior to other available methods for the fair and efficient resolution of the controversy.

IV

Defendants

16. Defendant Pfizer, Inc. (hereinafter Pfizer) is a corporation organized and existing under the laws of the State of Delaware with principal offices located in New York, New York. Pfizer is the successor to and was formerly known as and transacted business under the name

of Chas. Pfizer & Co., Inc. Pfizer is and was engaged in the manufacture, sale, and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including the RVN. In its international manufacturing and sales activities, Pfizer sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

17. Defendant American Cyanamid Company (hereinafter Cyanamid) is a corporation organized and existing under the laws of the State of Maine with principal offices located in New York, New York. Cyanamid is and was engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including the RVN. In its international manufacturing and sales activities, Cyanamid sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

18. Defendant Bristol-Myers is a corporation organized and existing under the laws of the State of Delaware whose principal offices are located in New York, New York. The activities of Bristol-Myers in the pharmaceutical field are carried on by Bristol Laboratories Division. Prior to December 1959, the business and assets of the Bristol Laboratories Division were operated as a wholly owned subsidiary of Bristol-Myers Company. Defendant Bristol-Myers Company and Bristol Laboratories, Inc., are hereinafter severally and jointly referred to as "Bristol" unless otherwise indicated. Bristol is and was engaged in the

manufactue, sale and distibution of various drug products including BSA and BSAP, which business is conducted in the United States and throughout the world, including the RVN. In its international manufacturing and sales activities, Bristol sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

19. Defendant Upjohn Company (hereinafter Upjohn) is a corporation organized and existing under the laws of the State of Michigan with principal offices located in Kalamazoo, Michigan. Upjohn was and is engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including the RVN. In its international manufacturing and sales activities, Upjohn sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

20. Olin Corporation is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal offices located in New York, New York. Olin is the successor to and formerly was known as and transacted business under the name Olin Mathieson Chemical Corporation. Until approximately January 1968, Olin was engaged in the manufacture, sale and distribution of various drug products, including BSA, which business was conducted in the United States and throughout the world, including the RVN. In its international manufacturing and sales activities, Olin sometimes operated and conducted business through wholly or substantially owned foreign or domestic subsidiaries.

21. Squibb, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices and place of business located at 460 Park Avenue, New York, New York.

22. E. R. Squibb & Sons, Inc. (sometimes hereinafter referred to as Squibb) is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located in New York, New York. E. R. Squibb & Sons, Inc., is a wholly owned subsidiary of Squibb, Inc., and is engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, in the United States and throughout the world, including the RVN. Prior to approximately January 1, 1966, the business and assets of E. R. Squibb & Sons, Inc., were operated as the Squibb Division of the defendant Olin. Effective January 1, 1966, Olin transferred all assets and liabilities relating to its pharmaceutical operations to E. R. Squibb & Sons, Inc., a wholly owned subsidiary. In September 1967, Olin and Beech-Nut Life Savers, Inc. (Beech-Nut) agreed upon a merger of E. R. Squibb & Sons, Inc., and Beech-Nut. In anticipation of the merger, Olin transferred all the capital stock of its subsidiary E. R. Squibb & Sons, Inc., in exchange for all of the stock of Squibb, Inc., a corporation newly organized for purposes of effectuating the merger. Immediately prior to the merger, Olin distributed its entire interest in Squibb, Inc., to Olin's stockholders on a pro rata basis. On January 15, 1968, Beech-Nut was merged into Squibb Enterprises, Inc., a wholly owned subsidiary of Squibb, Inc., and the stockholders of Beech-Nut received shares of Squibb, Inc., in

exchange for their stock. The name of Squibb, Inc., was changed to Squibb Beech-Nut, Inc., which on April 30, 1971, changed its name to Squibb, Inc. Squibb, Inc., operates through four major subsidiaries: E. R. Squibb & Sons, Inc.; Beech-Nut, Inc.; Dobbs House, Inc.; and Lanvin-Charles of the Ritz, Inc. As a result of these transactions, the assets formerly held by E. R. Squibb & Sons, Inc., the Olin subsidiary, are now held by the defendant E. R. Squibb & Sons, Inc., which is a newly organized, wholly owned subsidiary of Squibb, Inc. In its international manufacturing and sales activities, Squibb sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

V

Definitions

23. As used herein:

a. The term "antibiotics" means chemical substances produced by a microorganism, or by chemical synthesis, which have the capacity to inhibit the growth of other harmful microorganisms or to destroy them.

b. The term "broad spectrum antibiotics" (sometimes herein referred to as BSA) means antibiotics which are effective against a wide range of harmful microorganisms, including gram positive and gram negative pathogenic microorganisms, rickettsiae, viruses, spirochetes and protozoa. BSA includes tetracycline, chlortetracycline, oxytetracycline, doxycycline, minocycline, demeclocycline and methacycline.

c. The term "Tetracycline" means the generic name of the broad spectrum antibiotic whose chemical name and structure are 4-dimethylamino—1, 4, 4a, 5, 5a, 6, 11, 12a—octahydro—3, 6, 10, 12, 12a—pentahydroxy—6 methyl—1, 11—dioxo—2 napththa-cene carboxamide and salts, hydrates, esters, complexes and analogs thereof.

d. The term "Aureomycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Cyanamid whose generic name is chlortetracycline, and salts and analogs thereof.

e. The term "Terramycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Pfizer, whose generic name is oxytetracycline, and salts and analogs thereof.

f. The term "Chloromycetin" means the brand name of the broad spectrum antibiotic manufactured and sold by Parke, Davis & Co., whose generic name is chloramphenicol.

g. The term "Products" shall mean any product in the form in which it is sold to retail and wholesale sellers of drugs, hospital, surgical and dental supply houses, doctors, dentists, hospitals, clinics, and government agencies and government institutions, or any one of them. "BSAP" as hereinafter sometimes used shall mean broad spectrum antibiotic products.

h. The term "bulk form" means the chemical form in which a pharmaceutical product is manufactured but which requires packaging in dosage form so as to render it suitable for sale to the drug trade and dispensing to the ultimate consumer.

VI

Nature of Trade and Commerce

24. BSAP are widely used by the medical profession in the treatment of human infectious diseases. They are effective against a wide range of infectious diseases. BSA are used and sold throughout the world and are regularly shipped within and from the United States in interstate and foreign commerce.

25. During most of the period covered by this Complaint, the BSAP market consisted of (a) Aureomycin, (b) Terramycin, (c) Tetracycline, and (d) Chloromycetin. All four are effective against substantially the same range of pathogenic microorganisms and are substantially interchangeable in medical use. Aureomycin, Terramycin and Chloromycetin have closely similar molecular structures.

26. The first broad spectrum antibiotic sold in the United States was chlortetracycline. Since December 1948, Cyanamid has marketed this product under the trade name "Aureomycin". On September 14, 1949, Cyanamid, as the assignee of the Duggar application, received U.S. Patent No. 2,482,055 on "Aureomycin and the preparation of same." On September 2, 1952, Cyanamid, as the assignee of the Niedercorn application, received U.S. Patent No.

2,609,329, which was an improvement patent on the process for producing Aureomycin.

27. On October 4, 1949, Parke, Davis & Co., received U.S. Patent No. 2,483,885 on the broad spectrum antibiotic chloramphenicol; and since 1949 it has marketed the product under the trade name Chloromycetin.

28. On July 18, 1950, Pfizer received U.S. Patent No. 2,516,080 on the broad spectrum antibiotic oxytetracyline; and since 1950 it has marketed the product under the trade name of Terramycin.

29. On January 11, 1955, Pfizer, as assignee of the Conover application, received U.S. Patent No. 2,699,054 on the broad spectrum antibiotic Tetracycline.

30. Tetracycline is manufactured by one of two principal methods: (1) a process which subjects chlortetracycline to hydrogenation in the presence of a catalyst which removes the chlorine atom from the molecule, and (2) by a direct fermentation process. At the outset of their manufacture of Tetracycline and for a substantial period of time thereafter, Pfizer and Cyanamid used the hydrogenation process while Bristol used the direct fermentation process.

31. During much of the period covered by this Complaint, Tetracycline was manufactured only by Pfizer, Cyanamid and Bristol. In the United States, Tetracycline was not manufactured by any manufacturer other than Pfizer, Cyanamid and Bristol until late in 1962.

32. Cyanamid has been licensed by Pfizer to manufacture and sell Tetracycline since the issuance of the Conover

patent on January 11, 1955. Bristol has been licensed by Pfizer to manufacture and sell Tetracycline since March 28, 1956. Upjohn and Squibb have been licensed to sell some Tetracycline products since March 28, 1956, pursuant to the terms of an agreement between each of them and Pfizer.

33. For a substantial portion of the time covered by this Complaint, Tetracycline products were sold in the U.S. and abroad only by Pfizer, Cyanamid, Bristol, Upjohn and Squibb. Cyanamid commenced selling Tetracycline products in November 1953; Pfizer, in January 1954; Bristol, in April 1954; Squibb in September 1954; and Upjohn in October 1954.

34. For many years commencing in 1954, Upjohn and Squibb purchased all their bulk Tetracycline from Bristol, which, for a substantial period of time covered by this Complaint, was the only seller of bulk Tetracycline.

35. Each of the defendant companies sells Tetracycline products under its own brand or trade name. All use substantially identical dosage forms. The introductory brand names used by Defendants for their Tetracycline products were Cyanamid's "Achromycin"; Pfizer's "Tetracyn"; Bristol's "Polycycline"; Squibb's "Steclin"; and Upjohn's "Panmycin".

36. Cyanamid did not license anyone to manufacture and sell Chlortetracycline in the U.S., and for many years it limited its licenses abroad to its subsidiary companies.

37. Pfizer did not license anyone to manufacture and sell oxytetracycline in the U.S. and limited its licenses abroad to its subsidiary companies.

38. Parke, Davis & Co. did not license anyone to manufacture and sell chloramphenicol in the U.S. and limited its licenses abroad to its subsidiary companies.

39. As a result, Cyanamid, Pfizer and Parke, Davis enjoyed a monopoly on the production and sale of their respective BSA in the United States.

40. Cyanamid and Pfizer each applied for and obtained foreign counterpart patents for chlortetracycline and oxytetracycline respectively and Pfizer for tetracycline and each company sought and received many foreign counterpart patents for improvements and process patents for the manufacture of these drugs and other subsequently developed BSA.

41. Bristol applied for and received foreign counterpart patents for the production or process or manufacture of certain BSA or BSAP; and in certain foreign countries Bristol obtained a product patent on Tetracycline, notwithstanding its failure to obtain such a patent in the United States.

42. As a result of obtaining the aforesaid U.S. and foreign counterpart patents and their policy not to license others to manufacture or sell these BSA, Pfizer, Cyanamid, Bristol, and Parke, Davis enjoyed a monopoly on the production and sale of these antibiotics throughout much of the world.

43. Tetracycline is the most widely used broad spectrum antibiotic. In the United States sales of Tetracycline products in 1954 amounted to about $39,500,000. In 1957 these

sales totaled approximately $114,000,000 and in 1959 the amount sold was $95,000,000.

44. BSAP are sold by Defendants to customers who are classified in the U.S. market as either retail druggists, wholesalers, private hospitals, tax-supported hospitals, or federal government agencies. All Defendants sell directly to these classifications except that Upjohn has not always sold directly to wholesalers.

45. Within the United States, prices of all BSAP remained substantially unchanged from October 1951 to at least July 1960 to the retailer, wholesaler and hospital classifications.

46. International pricing and sales policies for BSA and BSAP are coordinated and controlled by each Defendant's respective management within the United States. Sales and price policies of Defendants' overseas subsidiaries engaged in the manufacture or sale of BSA or BSAP are reviewed by each Defendant's respective management within the United States and are subject to the control of management within the United States.

47. Patent licensing agreements and bulk sales agreements between Defendants and manufacturers or sellers of BSA and BSAP outside of the United States are reviewed and approved by each Defendant's respective management within the United States. Such agreements relating to BSA and BSAP are frequently negotiated within the United States.

48. Substantial quantities of BSA and BSAP manufactured by Defendants in the United States have been

sold and shipped to customers outside of the United States, including customers in the RVN.

49. Some BSA and BSAP purchased from the Defendants by customers in the RVN may have been manufactured outside of the United States by Defendants' wholly or partially owned subsidiaries.

50. Some BSA and BSAP purchased by customers in the RVN may have been manufactured outside of the United States by licensees of Defendants. Such licensees pay or paid royalties to Defendants based upon the use of Defendants' U.S. BSA patents and their foreign counterparts. These patents include but are not limited to the foreign counterpart patents of U.S. Patent No. 2,600,054 (Conover); U.S. Patent No. 2,482,055 (Duggar); U.S. Patent No. 2,609,329 (Niedercorn); U.S. Patent No. 2,734,018 (Minieri); U.S. Patent No. 3,092,556; Reissue RE 25,840 (Growich).

VII

Background of the Conspiracy

51. In 1952 Pfizer's Terramycin product sales in the United States totaled over $39,000,000. Cyanamid's Aureomycin product sales in the United States totaled over $38,000,000. These sales amounted to approximately 78 percent of the broad spectrum product market in 1952.

52. In 1953 Pfizer's Terramycin product sales in the United States totaled over $36,500,000. Cyanamid's Aureomycin product sales in the United States were about $32,000,000. These sales amounted to approximately 92 percent of the broad spectrum product market in 1953.

53. As of November 1953, prices of the narrow spectrum antibiotics such as penicillin and streptomycin, which were not patented and were sold by numerous companies, were severely depressed. Each of the defendant companies engaged or had been engaged in the manufacture or sale of such narrow spectrum antibiotics.

54. As of November 1953, Bristol Laboratories, Inc., a then wholly owned subsidiary of Bristol (and presently an operating division thereof) was operating at a loss by reason of the continued decline in the sales price of penicillin which then constituted the major part of the total business of Bristol Laboratories, Inc.

55. As of November 1953, prices of the BSAP then on the market, all patented, were all substantially identical and non-competitive, and had all been maintained at the price level in effect on October 1, 1951.

56. As of November 1953, patent applications on Tetracycline, filed in 1953 by Pfizer, Cyanamid and Bristol severally, were pending in the Patent Office. Pfizer's pending application was a continuation of a previous application rejected by the Patent Office.

57. On September 23, 1953, Heyden Chemical Company filed an application for a patent on Tetracycline. This application was acquired by Cyanamid in December 1953 after arrangements for its acquisition had been completed in November 1953.

58. On or about October 29, 1953, Pfizer and Cyanamid were informed by the Patent Office that an interference

would probably be declared on their respective Tetracycline patent applications.

59. By October 1953, Pfizer knew that Cyanamid was interested in Tetracycline and was testing it clinically. Cyanamid also knew then that Pfizer was interested in Tetracycline.

60. As of November 1953, Pfizer and Cyanamid knew that Tetracycline was directly competitive with Terramycin and Aureomycin respectively, and that Tetracycline represented a threat to the continuation of their dominant positions and high profits in the then existing BSAP market. Pfizer and Cyanamid also knew that unless one of them could obtain a product patent on Tetracycline, prices of the BSAP could become competitive.

61. In 1954, Bristol had a very small sales force selling pharmaceuticals directly to the drug trade. Upjohn and Squibb, at such time, each had a very large sales force engaged in the direct sale of pharmaceuticals to the drug trade.

62. Prior to the introduction of Tetracycline products, Cyanamid was manufacturing and selling Aureomycin, ostensibly pursuant to coverage under the Duggar and Niedercorn patents and Cyanamid purportedly had the ability to exclude other companies from the Aureomycin market through the assertion of these patents. In applying for these patents and during the processing of these patent applications, Cyanamid did not disclose the best known mode and manner of its invention and thereby obtained these patents by knowing and willful non-compliance with

Patent Office requirements. Accordingly, there is substantial reason to believe that these patents are invalid and unenforceable.

63. Cyanamid's Growich and Minieri patent applications did not conform with Patent Office rules and standards which may render these patents invalid and unenforceable.

VIII

Violations of Law

64. Beginning in or about November 1953, the exact date being unknown to Plaintiff, the Defendants have engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture, sale and distribution of BSA and BSAP, have combined and conspired to monopolize such interstate and foreign trade and commerce and have attempted to monopolize and monopolized such trade and commerce, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The substantial terms of the aforesaid violations have been and are that:

a. The manufacture of Tetracycline be confined to Pfizer, Cyanamid and Bristol in the United States and to a limited number of licensees abroad.

b. The sale of Tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb in the United States and to a limited number of licensees abroad.

c. The sale of bulk Tetracycline be confined to Bristol and bulk Tetracycline be sold by Bristol only to Upjohn and Squibb in the United States and Defendants' bulk sales abroad would be to a limited and controlled number of customers.

d. The sale of BSAP by the defendant companies, their subsidiaries and their licensees and/or bulk customers in the United States and abroad be at substantially identical and non-competitive prices.

65. Pfizer, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Tetracycline, in the United States and abroad; further, Pfizer, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Tetracycline market.

66. Cyanamid, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Chlortetracycline, in the United States and abroad; further, Cyanamid, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit

this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Chlortetracycline market.

67. The said violations have been effectuated by various means and methods including, but not limited to, those alleged in paragraphs 69 through 91 of this Complaint.

68. Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other domestic and most foreign applicants.

69. Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other domestic and most foreign applicants.

70. Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline.

71. Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent.

72. Pfizer, Cyanamid and Bristol withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

73. Cyanamid acquired the competing Heyden patent application on Tetracycline and abandoned the product claims therein.

74. Bristol sold bulk Tetracycline only to Upjohn and Squibb. For a substantial period of time covered by this Complaint, each of the defendant companies refused to sell bulk Tetracycline to all others except that Cyanamid sold a

large amount of bulk Tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the Tetracycline product market.

75. Bristol entered into agreements with Upjohn and Squibb, respectively, which required Upjohn and Squibb to purchase all their requirements of bulk Tetracycline from Bristol.

76. Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline products.

77. Pfizer and Cyanamid have maintained substantially identical, non-competitive prices on Terramycin products and Aureomycin products, respectively.

78. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies thereafter maintained such substantially identical, non-competitive prices.

79. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications.

80. Defendants have communicated with one another and advised one another both in the United States and

throughout the world with respect to current and future prices of BSAP.

81. Defendants have jointly sought to restrict or inhibit the purchase of BSA and BSAP which were not manufactured by one of the Defendants.

82. Defendants have consulted with respect to action to inhibit or foreclose the purchase of BSA and BSAP in their generic form and have jointly acted to inhibit or foreclose such purchases.

83. Defendants have jointly agreed as to which patents on BSA and BSAP would be maintained on a worldwide (country-by-country) basis.

84. Defendants have advised and consulted with each other with respect to which of them would bring patent infringement actions or threaten such actions and under which patent relating to BSAP such legal action or threat of legal action would be based in order to prevent the sale of BSA or BSAP by companies other than the Defendants or their licensees.

85. Defendants have threatened to bring and have brought legal actions to prevent the sale of BSA or BSAP by persons other than Defendants or their licensees notwithstanding Defendants' knowledge that patents relied upon in such lawsuits were fraudulently obtained or were being misused.

86. Defendants have entered into understandings, express or implicit, among themselves and their licensees that certain Defendants or certain of their licensees would not compete in some markets or areas of the world.

87. Defendants have established or attempted to establish worldwide or area prices concerning and governing the sale of BSAP.

88. Defendants have knowingly disparaged the quality of competitive product and have sought to convince prospective customers that competitive BSAP were inferior notwithstanding Defendants' knowledge of the falsity of such assertions or statements.

89. Defendants have purchased or attempted to purchase additional fermentation capacity or entered into bulk purchase contracts with other fermenters thus giving them control over competitive fermentation capacity for BSA and BSAP.

90. Defendants have sold BSA and BSAP on the express or implicit understanding that such products would not be re-exported in any form outside of the country in which they were originally sold.

IX

Effects of the Violations

91. The violations hereinbefore alleged have had the following effects on interstate and foreign commerce, among others:

a. The RVN and its political subdivisions, individual consumers, hospitals and clinics, retailers, wholesalers and importers in the RVN, have all been deprived of the benefits of competition and have been compelled to pay high, non-competitive prices for BSA and BSAP.

b. The RVN has been deprived of vital foreign exchange reserves because excessive amounts of foreign exchange have been required not only to pay for BSA and BSAP at the non-competitive prices charged by Defendants or their licensees but also to enable Defendants or their licensees to make remittances from the RVN, in United States dollars or other foreign currencies, of their profits resulting from sales in the RVN of BSA and BSAP at the non-competitive prices charged by them.

c. Pfizer and Cyanamid have been able to maintain unchanged for prolonged periods their substantially identical, non-competitive, high prices of Terramycin products and Aureomycin products without any price competition from Tetracycline products.

d. Pfizer, Cyanamid, Bristol, Upjohn and Squibb have been able to maintain unchanged for prolonged periods substantially identical, non-competitive, high prices of all BSA and BSAP sold by them, and price competition in the sale and distribution of BSA and BSAP has been prevented and suppressed.

e. Pfizer, Cyanamid, and Bristol, Squibb and Upjohn have been able to make non-competitive, high profits from sale of their BSAP.

f. Bristol has been able to make non-competitive, high profits in the sale of bulk Tetracycline.

g. A judicial determination of the validity of Pfizer's Tetracycline patent has been prevented.

h. Introduction of improved forms and methods of administration of BSA by other companies has been restricted and prevented, and research in this field has been hampered.

i. Pharmaceutical companies other than the defendant companies desiring to engage in the manufacture or sale of BSA or BSAP have been prevented and precluded from doing so.

j. Other producers and sellers of BSA and BSAP have been precluded from effectively competing in the RVN.

X

Judgments in Governmental Proceedings

92. On July 28, 1958, the Federal Trade Commission issued a Complaint against Pfizer, Bristol, Cyanamid, Squibb and Upjohn, charging, *inter alia*, that Pfizer made false, misleading and incorrect statements to, and withheld material information from, the United States Patent Office for the purpose and with the effect of inducing the issuance of a patent on Tetracycline. *In the Matter of American Cyanamid Co., et al.*, F.T.C. Docket No. 7211. The Complaint also alleged that Bristol and Cyanamid withheld from the Patent Office material information in the course of the prosecution of patent applications, as a result of which Pfizer was aided in obtaining its Tetracycline patent. It was further alleged that Cyanamid, Bristol, Squibb and Upjohn solicited and accepted licenses from Pfizer under the Tetracycline patent, knowing that material information

had been withheld from the Patent Office by one or more of the Defendants. The Complaint further alleged that all five Defendants conspired and combined to fix and maintain prices of BSA, including Tetracycline. On September 29, 1967, the Federal Trade Commission found that Pfizer had obtained the Tetracycline patent by material misrepresentation to, and withholding pertinent information from, the Patent Office; that Pfizer had attempted to monopolize Tetracycline; and that Cyanamid had also withheld material information from the Patent Office in connection with the issuance of the Tetracycline patent. The Commission found that Pfizer's conduct violated Section 2 of the Sherman Act and was therefore a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission further found that Cyanamid's conduct also violated Section 5 of the Federal Trade Commission Act. The Commission issued a final order directing Pfizer and Cyanamid to make licenses under their patents on Tetracycline and Aureomycin available to all other domestic companies on a specified royalty basis. On September 30, 1968, the United States Court of Appeals for the Sixth Circuit affirmed the decision and order of the Federal Trade Commission. *Charles Pfizer & Co.* v. *F.T.C.*, 401 F.2d 574 (6th Cir. 1968). Plaintiff's action is based in part upon the matters complained of and determined in this proceeding.

93. On August 17, 1961, the United States of America instituted a criminal prosecution, 61 Cr. 772, in the United States District Court for the Southern District of New York, naming Pfizer, Cyanamid and Bristol as defendants, and Squibb and Upjohn as co-conspirators. The three-

count indictment alleged the same combination and conspiracy to restrain trade and to monopolize and monopolization which are the subject matter of the present action. On December 29, 1967, after a jury trial, defendants Pfizer, Cyanamid and Bristol were each found guilty of each of the violations charged. Judgments of conviction were entered and maximum fines imposed on February 28, 1968. On January 28, 1972, an equally divided Supreme Court affirmed an order of the Second Circuit, 437 F.2d 957, affirming 426 F.2d 32, that a new trial was required due to errors in the jury charge delivered by the District Court. Plaintiff's action is based in part upon the matters charged in this proceeding.

XI

Fraudulent Concealment

94. Plaintiff had no knowledge of the violations alleged herein or of the facts which might have led to the discovery of the violations, until after the institution of the litigation referred to in paragraphs 92 and 93. Plaintiff could not have discovered the said antitrust violations at an earlier date by the exercise of due diligence, inasmuch as said antitrust violations had been fraudulently concealed from their inception by the Defendants by various means and methods used to avoid the detection thereof. Said fraudulent concealment consisted in part of the following acts: misrepresenting material facts and withholding pertinent information from the Patent Office; tightly controlling the dissemination of documents containing relevant data and subsequently destroying these documents.

95. During the pendency of the litigation referred to in paragraphs 92 and 93 and the fraudulent concealment referred to in paragraph 94, the statute of limitations applicable to the instant action (Clayton Act, Section 4(b), 15 U.S.C. § 15(b)) has been and continues to be suspended as provided by statute and otherwise. Clayton Act, Section 5(b), 15 U.S.C. § 16(b).

XII

Injury to Plaintiff

96. During the period of the Defendants' violations of the Sherman Act, Plaintiff and other members of the classes represented by Plaintiff purchased BSA and BSAP from the Defendants and others. By reason of said violations, Plaintiff and other members of the classes represented by Plaintiff have been denied the benefits of unrestricted competition, and have paid more for BSA and BSAP than they would have paid had Defendants' violations not existed. As a result, Plaintiff and other members of the class it represents have been injured and damaged in their business or property by Defendants in an amount which presently is undetermined.

PRAYER

Wherefore, Plaintiff prays that:

(1) this Court adjudge and decree that the Defendants, and each of them, have combined and conspired to restrain and monopolize interstate and foreign trade and commerce in the manufacture, distribution and sale of BSA and

BSAP; have each of them restrained such trade and commerce; and have monopolized and attempted to monopolize such trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act;

(2) judgment be entered in favor of Plaintiff and the classes represented by Plaintiff against the Defendants, jointly and severally, for the injury and damage caused by Defendants in an amount threefold the actual damages sustained with interest thereon;

(3) this Court allow, and Defendants be required to pay, jointly and severally, the full costs of this suit, including as part thereof a reasonable fee for the services of Plaintiff's attorneys; and

(4) Plaintiff be granted such other, further, and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

Kirkwood, Kaplan, Russin & Vecchi
Counsel for Plaintiff
1218 Sixteenth Street N.W.
Washington, D. C. 20036
(202) 638-0060

by /s/ Lawrence R. Velvel
Lawrence R. Velvel

JURY DEMAND

Please take notice that Plaintiff demands a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure of all issues triable of right by a jury.

Amended Complaint of the Republic of the Philippines, dated Dec. 14, 1973, including Further Amendment, dated Jan. 8, 1974, as filed on April 11, 1974.

UNITED STATES DISTRICT COURT

DISTRICT OF COLUMBIA

4-71 Civ. 435
D. of Minnesota
[Dist. of Columbia
Civil Action No. 650-72]

(A. Complaint for Damages and Injunctive Relief Under the Antitrust Laws)

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,

Plaintiff,

v.

PFIZER, INC.; AMERICAN CYANAMID COMPANY; BRISTOL-MYERS COMPANY; SQUIBB, INC.; E. R. SQUIBB AND SONS, INC.; OLIN CORP.; AND THE UPJOHN COMPANY,

Defendants.

JOSEPH B. FRIEDMAN
1028 Connecticut Avenue, N.W.
Washington, D.C. 20006

EPHRAIM JACOBS
DOUGLAS V. RIGLER
HOLLABAUGH & JACOBS
910-17th Street, N.W.
Washington, D.C. 20006
202-296-5121

Amended Complaint

Plaintiff, the Republic of the Philippines, its departments, agencies, commissions, institutions, instrumentalities and political subdivisions brings this complaint for itself by and

through the Central Bank of the Philippines and on behalf of a class consisting of all hospitals and clinics in the Philippines, both government and private, and on behalf of a class consisting of all individual consumers who purchased broad spectrum antibiotics and broad spectrum antibiotic products, to recover treble damages and to obtain injunctive relief due to the defendants' violations of the antitrust laws relating to the foreign and interstate commerce of the United States and alleges as follows:

I.

JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15, 26) to obtain injunctive relief and to recover threefold the damages which the plaintiff and the classes it represents have sustained due to the violations by the defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) plus costs of suit and reasonable attorneys' fee.

2. Each defendant maintains an office, transacts business, is found, or has an agent within this district.

II.

DESCRIPTION OF THE ACTION

3. Plaintiff brings this action:

a. For itself, its departments, agencies, commissions, institutions, instrumentalities and political subdivisions.

b. As representative of a class consisting of all hospitals and clinics throughout the Philippines which purchase broad spectrum antibiotics and BSA products. There are numerous hospitals and clinics throughout the Philippines, some of which are government owned and operated; others of which are privately owned or operated in whole or in part. The class of hospitals is so numerous the joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the plaintiff are typical of the claims of the members of this class; and plaintiff will fairly and adequately protect the interests of the class.

c. As representative of a class consisting of all individual consumers in the Philippines who purchased broad spectrum antibiotics and broad spectrum antibiotic products. The consumer class is so numerous that the joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the plaintiff are typical of the claims of the members of this class; and plaintiff will fairly and adequately protect the interests of the class.

III.

Definitions

4. As used herein:

a. The term "antibiotics" means chemical substances produced by a micro-organism, or by chemical synthesis, which have the capacity to inhibit the

growth of other harmful micro-organisms or to destroy them.

b. The term "broad spectrum antibiotics" (sometimes herein referred to as BSA) means antibiotics which are effective against a wide range of harmful micro-organisms, including gram positive and gram negative pathogenic micro-organisms, rickettsiae, viruses, spirochetes and protozoa. BSA includes tetracycline, chlortetracyline, oxytetracyline, doxycycline, minocycline, demeclocycline, methacycline.

c. The term "Tetracycline" means the generic name of the broad spectrum antibiotic whose chemical name and structure are 4-dimethylamino—1, 4, 4a, 5, 5a, 6, 11, 12a—octahydro—3, 6, 10, 12, 12a—pentahydroxy—6 methyl—1, 11—dioxo—2 napthhacene carboxamide and salts, hydrates, esters, complexes, and analogs thereof.

d. The term "Aureomycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Cyanamid whose generic name is chlortetracycline, and salts and analogs thereof.

e. The term "Terramycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Pfizer, whose generic name is oxytetracycline, and salts and analogs thereof.

f. The term "Chloromycetin" means the brand name of the broad spectrum antibiotic manufactured and sold by Parke, Davis & Co., whose generic name is chloramphenicol.

g. The term "Products" shall mean any product in the form in which it is sold to retail and wholesale sellers of drugs, hospital, surgical and dental supply houses, doctors, dentists, hospitals, clinics, and government agencies and government institutions, or any one of them. "BSAP" as hereinafter sometimes used shall mean broad spectrum antibiotic products.

h. The term "bulk form" means the chemical form in which a pharmaceutical product is manufactured but which requires packaging in dosage form so as to render it suitable for sale to the drug trade and dispensing to the ultimate consumer.

IV.

The Parties

5. The Republic of the Philippines is the sovereign and independent government of the people of the Philippines. Through its various departments, bureaus, agencies, commissions, institutions, instrumentalities and political subdivisions, it has purchased substantial quantities of broad spectrum antibiotics and BSA products during the period in suit. The Central Bank of the Philippines is a government agency created by Republic Act No. 265, approved June 15, 1948.

6. Defendant Pfizer, Inc. (hereinafter "Pfizer") is a corporation organized and existing under the laws of the State of Delaware with principal offices located in New York, New York. Pfizer is the successor to and was formerly known as and transacted business under the name of Chas. Pfizer & Co., Inc. Pfizer is and was engaged in

the manufacture, sale, and distribution of various drug products including broad spectrum antibiotics and BSAP, which business is conducted in the United States and throughout the world including the Republic of the Philippines. In its international manufacturing and sales activities, Pfizer sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

7. Defendant American Cyanamid Company (hereinafter "Cyanamid") is a corporation organized and existing under the laws of the State of Maine with principal offices located in New York, New York. Cyanamid is and was engaged in the manufacture, sale, and distribution of various drug products, including broad spectrum antibiotics and BSAP which business is conducted in the United States and throughout the world including the Republic of the Philippines. In its international manufacturing and sale activities, Cyanamid sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

8. Defendant Bristol-Myers is a corporation organized and existing under the laws of the State of Delaware whose principal offices are located in New York, New York. The activities of Bristol-Myers in the pharmaceutical field are carried on by Bristol Laboratories Division. Prior to December 1959, the business and assets of the Bristol Laboratories Division were operated as a wholly owned subsidiary of Bristol-Myers Company. Defendant Bristol-Myers Company and Bristol Laboratories, Inc. are hereinafter severally and jointly referred to as "Bristol" unless

otherwise indicated. Bristol is and was engaged in the manufacture, sale, and distribution of various drug products including broad spectrum antibiotics and BSAP, which business is conducted in the United States and throughout the world including the Republic of the Philippines. In its international manufacturing and sales activities, Bristol sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

9. Defendant Upjohn Company (hereinafter "Upjohn") is a corporation organized and existing under the laws of the State of Michigan with principal offices located in Kalamazoo, Michigan. Upjohn was and is engaged in the manufacture, sale, and distribution of various drug products including broad spectrum antibiotics and BSAP which business is conducted in the United States and throughout the world including the Republic of the Philippines. In its international manufacturing and sales activities, Upjohn sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

10. Olin Corporation is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal offices located in New York, New York. Olin is the successor to and formerly was known as and transacted business under the name Olin Mathieson Chemical Corporation. Until approximately January 1968, Olin was engaged in the manufacture, sale, and distribution of various drug products including broad spectrum antibiotics, which business was conducted in the United States and throughout the world including the Republic of the Philippines. In its international manufacturing and sales

activities, Olin sometimes operated and conducted business through wholly or substantially owned foreign or domestic subsidiaries.

11. Squibb, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal offices and place of business located at 460 Park Avenue, New York, New York.

12. E. R. Squibb & Sons, Inc. (sometimes hereinafter referred to as "Squibb") is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of busines located in New York, New York. E. R. Squibb & Sons, Inc. is a wholly owned subsidiary of Squibb, Inc. and is engaged in the manufacture, sale, and distribution of various drug products including broad spectrum antibiotics and BSA products in the United States and throughout the world including the Republic of the Philippines. Prior to approximately January 1, 1966, the business and assets of E. R. Squibb & Sons, Inc. were operated as the Squibb Division of the defendant Olin. Effective Janaury 1, 1966, Olin transferred all assets and liabilities relating to its pharmaceutical operations to E. R. Squibb & Sons, Inc., a wholly owned subsidiary. In September 1967, Olin and Beech-Nut Life Savers, Inc. ("Beech-Nut") agreed upon a merger of E. R. Squibb & Sons, Inc. and Beech-Nut. In anticipation of the merger, Olin transferred all the capital stock of its subsidiary E. R. Squibb & Sons, Inc. in exchange for all of the stock of Squibb, Inc., a corporation newly organized for purposes of effectuating the merger. Immediately prior to the merger, Olin distributed its entire interest in Squibb, Inc. to

Olin's stockholders on a pro rata basis. On January 15, 1968 Beech-Nut was merged into Squibb Enterprises, Inc., a wholly-owned subsidiary of Squibb, Inc. and the stockholders of Beech-Nut received shares of Squibb, Inc. in exchange for their stock. The name of Squibb, Inc. was changed to Squibb Beech-Nut, Inc., which on April 30, 1971, changed its name to Squibb, Inc. Squibb, Inc. operates through four major subsidiaries; E. R. Squibb & Sons, Inc.; Beech-Nut, Inc.; Dobbs House, Inc.; and Lanvin-Charles of the Ritz, Inc. As a result of these transactions, the assets formerly held by E. R. Squibb & Sons, Inc., the Olin subsidiary, are now held by the defendant E. R. Squibb & Sons, Inc., which is a newly organized, wholly owned subsidiary of Squibb, Inc. In its international manufacturing and sales activities, Squibb sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

V.

Nature of Trade and Commerce

13. Broad spectrum antibiotics are widely used by the medical profession in the treatment of human infectious diseases. They are effective against a wide range of infectious diseases.

14. During most of the period covered by this complaint, the broad spectrum antibiotics market consisted of a) Aureomycin, b) Terramycin, c) Tetracycline, and d) Chloromycetin. All four are effective against substantially the same range of pathogenic micro-organisms and are substantially interchangeable in medical use. Aureomycin,

Terramycin, and Chloromycetin have closely similar molecular structures.

15. The first broad spectrum antibiotic sold in the United States was chlortetracycline. Since December 1948, Cyanamid has marketed this product under the trade name "Aureomycin". On September 14, 1949, Cyanamid, as the assignee of the Duggar application, received U.S. Patent No. 2,482,055 on "Aureomycin and the preparation of same." On September 2, 1952, Cyanamid as the assignee of the Niedercorn application, received U.S. Patent No. 2,609,329, which was an improvement patent on the process for producing Aureomycin.

16. On October 4, 1949, Parke, Davis & Co. received U.S. Patent No. 2,483,885 on the broad spectrum antibiotic chloramphenicol; and since 1949 it has marketed the product under the trade name Choloromycetin.

17. On July 18, 1950, Pfizer received U.S. Patent No. 2,516,080 on the broad spectrum antibiotic oxytetracycline; and since 1950 it has marketed the product under the trade name of Terramycin.

18. On January 11, 1955, Pfizer, as assignee of the Conover application, received U.S. Patent No. 2,699,054 on the broad spectrum antibiotic Tetracycline.

19. Tetracycline is manufactured by one of two principal methods: 1) a process which subjects chlortetracycline to hydrogenation in the presence of a catalyst which removes the chlorine atom from the molecule, and 2) by a direct fermentation process. At the outset of their manufacture of Tetracycline and for a substantial period of time

thereafter, Pfizer and Cyanamid used the hydrogenation process while Bristol used the direct fermentation process.

20. During much of the period covered by this complaint, Tetracycline was manufactured only by Pfizer, Cyanamid, and Bristol. In the United States, Tetracycline was not manufactured by any manufacturer other than Pfizer, Cyanamid, and Bristol until late in 1962.

21. Cyanamid has been licensed by Pfizer to manufacture and sell Tetracycline since the issuance of the Conover patent on January 11, 1955. Bristol has been licensed by Pfizer to manufacture and sell Tetracycline since March 28, 1956. Upjohn and Squibb have been licensed to sell some Tetracycline products since March 28, 1956, pursuant to the terms of an agreement between each of them and Pfizer.

22. For a substantial portion of the time covered by this complaint, Tetracycline products were sold in the U.S. and abroad only by Pfizer, Cyanamid, Bristol, Upjohn, and Squibb. Cyanamid commenced selling Tetracycline products in November 1953; Pfizer, in January 1954; Bristol, in April 1954; Squibb, in September 1954; and Upjohn, in October 1954.

23. For many years commencing in 1954, Upjohn and Squibb purchased all their bulk Tetracycline from Bristol, which, for a substantial period of time covered by this complaint, was the only seller of bulk Tetracycline.

24. Each of the defendant companies sells Tetracycline products under its own brand or trade name. All use substantially identical dosage forms. The introductory brand names used by defendants for their Tetracycline products

were Cyanamid's "Achromycin"; Pfizer's "Tetracyn"; Bristol's "Polycycline"; Squibb's "Steclin"; and Upjohn's "Panmycin".

25. Cyanamid did not license anyone to manufacture and sell Chlortetracycline in the U.S., and for many years it limited its licenses abroad to its subsidiary companies.

26. Pfizer did not license anyone to manufacture and sell oxytetracycline in the U.S. and limited its licenses abroad to its subsidiary companies.

27. Parke-Davis & Co. did not license anyone to manufacture and sell chloramphenicol in the U.S. and limited its licenses abroad to its subsidiary companies.

28. As a result, Cyanamid, Pfizer, and Parke-Davis enjoyed a monopoly on the production and sale of their respective broad spectrum antibiotics in the United States.

29. Cyanamid and Pfizer each applied for and obtained foreign counterpart patents for chlortetracycline and oxytetracycline respectively and Pfizer for tetracycline and each company sought and received many foreign counterpart patents for improvements and process patents for the manufacture of these drugs and other subsequently developed BSAs.

30. Bristol applied for and received foreign counterpart patents for the production or process of manufacture of certain broad spectrum antibiotics or BSA products; and in certain foreign countries Bristol obtained a product patent on Tetracycline, notwithstanding its failure to obtain such a patent in the United States.

31. As a result of obtaining the aforesaid U.S. and foreign counterpart patents and their policy not to license others to manufacture or sell these broad spectrum antibiotics, Pfizer, Cyanamid, Bristol, and Parke-Davis enjoyed a monopoly on the production and sale of these antibiotics throughout much of the world.

32. Tetracycline is the most widely used broad spectrum antibiotic. In the United States sales of Tetracycline products in 1954 amounted to about $39,500,000. In 1957 these sales totaled approximately $114,000,000 and in 1959 the amount sold was $95,000,000.

33. Broad spectrum antibiotic products are sold by defendants to customers who are classified in the U.S. market as either retail druggists, wholesalers, private hospitals, tax-supported hospitals, or federal government agencies. All defendants sell directly to these classifications except that Upjohn has not always sold directly to wholesalers.

34. Within the United States, prices of all broad spectrum antibiotic products remained substantially unchanged from October 1951 to at least July 1960 to the retailer, wholesaler, and hospital classifications.

35. International pricing and sales policies for broad spectrum antibiotics and BSA products are coordinated and controlled by each defendant's respective management within the United States. Sales and price policies of defendants' overseas subsidiaries engaged in the manufacture or sale of broad spectrum antibiotics or BSA products are reviewed by each defendant's respective management within the United States and are subject to the control of management within the United States.

36. Patent licensing agreements and bulk sales agreements between defendants and manufacturers or sellers of broad spectrum antibiotics and BSA products outside of the United States are reviewed and approved by each defendant's respective management within the United States. Such agreements relating to broad spectrum antibiotics and BSAP are frequently negotiated within the United States.

37. Substantial quantities of broad spectrum antibiotics and BSAP manufactured by defendants in the United States have been sold and shipped to customers outside of the United States, including customers in the Philippines.

38. Some broad spectrum antibiotics and BSAP purchased from the defendants by customers in the Philippines may have been manufactured outside of the United States by defendants' wholly or partially owned subsidiaries.

39. Some broad spectrum antibiotics and BSAP purchased by customers in the Philippines may have been manufactured outside of the United States by licensees of defendants. Such licensees pay or paid royalties to defendants based upon the use of defendants' U.S. broad spectrum antibiotics patents and their foreign counterparts. These patents include but are not limited to the foreign counterpart patents of U.S. Patent No. 2,600,054 (Conover); U.S. Patent No. 2,482,055 (Duggar); U.S. Patent No. 2,609,329 (Niedercorn); U.S. Patent No. 2,734,018 (Minieri); U.S. Patent No. 3,092,556; Reissue RE 25,840 (Growich).

VI.

BACKGROUND OF THE CONSPIRACY

40. In 1952 Pfizer's Terramycin product sales in the United States totaled over $39,000,000. Cyanamid's Aureomycin product sales in the United States totaled over $38,000,000. These sales amounted to approximately 78 percent of the broad spectrum product market in 1952.

41. In 1953 Pfizer's Terramycin product sales in the United States totaled over $36,500,000. Cyanamid's Aureomycin product sales in the United States were about $32,000,000. These sales amounted to approximately 92 percent of the broad spectrum product market in 1953.

42. As of November 1953, prices of the narrow spectrum antibiotics such as penicillin and streptomycin, which were not patented and were sold by numerous companies, were severely depressed. Each of the defendant companies engaged or had been engaged in the manufacture or sale of such narrow spectrum antibiotics.

43. As of November 1953, Bristol Laboratories, Inc., a then wholly owned subsidiary of Bristol (and presently an operating division thereof) was operating at a loss by reason of the continued decline in the sales price of penicillin which then constituted the major part of the total business of Bristol Laboratories, Inc.

44. As of November 1953, prices of the broad spectrum antibiotic products then on the market, all patented, were all substantially identical and non-competitive, and had all been maintained at the price level in effect on October 1, 1951.

45. As of November 1953 patent application on Tetracycline, filed in 1953 by Pfizer, Cyanamid and Bristol severally, were pending in the Patent Office. Pfizer's pending application was a continuation of a previous application rejected by the Patent Office.

46. On September 23, 1953, Heyden Chemical Company filed an application for a patent on Tetracycline. This application was acquired by Cyanamid in December 1953 after arrangements for its acquisition had been completed in November 1953.

47. On or about October 29, 1953, Pfizer and Cyanamid were informed by the Patent Office that an interference would probably be declared on their respective Tetracycline patent applications.

48. By October 1953, Pfizer knew that Cyanamid was interested in Tetracycline and was testing it clinically. Cyanamid also knew then that Pfizer was interested in Tetracycline.

49. As of November 1953, Pfizer and Cyanamid knew that Tetracycline was directly competitive with Terramycin and Aureomycin respectively, and that Tetracycline represented a threat to the continuation of their dominant positions and high profits in the then existing broad spectrum antibiotic products market. Pfizer and Cyanamid also knew that unless one of them could obtain a product patent on Tetracycline, prices of the broad spectrum antibiotic products could become competitive.

50. In 1954, Bristol had a very small sales force selling pharmaceuticals directly to the drug trade. Upjohn and

Squibb, at such time, each had a very large sales force engaged in the direct sale of pharmaceuticals to the drug trade.

50(A). Prior to the introduction of tetracycline products, Cyanamid was manufacturing and selling aureomycin, ostensibly pursuant to coverage under the Duggar and Niedercorn patents and Cyanamid purportedly had the ability to exclude other companies from the aureomycin market through the assertion of these patents. In applying for these patents and during the processing of these patent applications, Cyanamid did not disclose the best known mode and manner of its invention and thereby obtained these patents by knowing and willful non-compliance with patent office requirements. Accordingly, there is substantial reason to believe that these patents are invalid and unenforceable.

50(B). Cyanamid's Growich and Minieri patent applications did not conform with patent office rules and standards which may render these patents invalid and unenforceable.

VII.

Violations of Law

51. Beginning in or about November 1953, the exact date being unknown to plaintiff, the defendants have engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture, sale, and distribution of broad spectrum antibiotics and BSA products, have combined and conspired to monopolize such interstate and foreign trade and commerce and

have attempted to monopolize such trade and commerce, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

The substantial terms of the aforesaid violations have been and are that:

(a) The manufacture of Tetracycline be confined to Pfizer, Cyanamid, and Bristol in the United States and to a limited number of licensees abroad.

(b) The sale of Tetracycline Products be confined to Pfizer, Cyanamid, Bristol, Upjohn, and Squibb in the United States and to a limited number of licensees abroad.

(c) The sale of bulk Tetracycline be confined to Bristol and bulk Tetracycline be sold by Bristol only to Upjohn and Squibb in the United States and defendants' bulk sales abroad would be to a limited and controlled number of customers.

(d) The sale of broad spectrum antibiotic products by the defendant companies, their subsidiaries, and their licensees and/or bulk customers in the United States and abroad be at substantially identical and non-competitive prices.

52. The said violations have been effectuated by various means and methods including, but not limited to, those alleged in paragraphs 53 through 75 of this complaint.

53. Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other domestic and most foreign applicants.

54. Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other domestic and most foreign applicants.

55. Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline.

56. Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent.

57. Pfizer, Cyanamid and Bristol withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

58. Cyanamid acquired the competing Heyden patent application on Tetracycline and abandoned the product claims therein.

59. Bristol sold bulk Tetracycline only to Upjohn and Squibb. For a substantial period of time covered by this complaint, each of the defendant companies refused to sell bulk Tetracycline to all others except that Cyanamid sold a large amount of bulk Tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the Tetracycline product market.

60. Bristol entered into agreements with Upjohn and Squibb, respectively, which required Upjohn and Squibb to purchase all their requirements of bulk Tetracycline from Bristol.

61. Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline products.

62. Pfizer and Cyanamid have maintained substantially identical, non-competitive prices on Terramycin products and Aureomycin products, respectively.

63. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies thereafter maintained such substantially identical, non-competitive prices.

64. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market in dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications.

65. Defendants have communicated with one another and advised one another both in the United States and throughout the world with respect to current and future prices of broad spectrum antibiotic products.

66. Defendants have jointly sought to restrict or inhibit the purchase of broad spectrum antibiotics and broad spectrum antibiotic products which were not manufactured by one of the defendants.

67. Defendants have consulted with respect to action to inhibit or foreclose the purchase of broad spectrum antibiotics and BSA products in their generic form and have jointly acted to inhibit or foreclose such purchases.

68. Defendants have jointly agreed as to which patents on broad spectrum antibiotics and broad spectrum antibiotic products would be maintained on a worldwide (country-by-country) basis.

69. Defendants have advised and consulted with each other with respect to which of them would bring patent infringement actions or threaten such actions and under which patent relating to broad spectrum antibiotic products such legal action or threat of legal action would be based in order to prevent the sale of broad spectrum antibiotics or broad spectrum antibiotic products by companies other than the defendants or their licensees.

70. Defendants have threatened to bring and have brought legal actions to prevent the sale of broad spectrum antibiotics or BSA products by persons other than defendants or their licensees notwithstanding defendants' knowledge that patents relied upon in such law suits were fraudulently obtained or were being misused.

71. Defendants have entered into understandings, express or implicit, among themselves and their licensees that certain defendants or certain of their licensees would not compete in some markets or areas of the world.

72. Defendants have established or attempted to establish worldwide or area prices concerning and governing the sale of broad spectrum antibiotic products.

73. Defendants have knowingly disparaged the quality of competitive products and have sought to convince prospective customers that competitive broad spectrum antibiotic products were inferior notwithstanding defendants' knowledge of the falsity of such assertions or statements.

74. Defendants have purchased or attempted to purchase additional fermentation capacity or entered into bulk purchase contracts with other fermentors thus giving them control over competitive fermentation capacity for broad spectrum antibiotics and BSA products.

75. Defendants have sold broad spectrum antibiotics and BSA products on the express or implicit understanding that such products would not be re-exported in any form outside of the country in which they were originally sold.

VIII.

Effects of the Violations

76. The violations hereinbefore alleged have had the following effects on interstate and foreign commerce, among others:

(a) The Republic of the Philippines, individual consumers, and private and government-supported hospitals in the Philippines have been deprived of the benefits of competition and have been compelled to pay high, non-competitive prices for broad spectrum antibiotics and BSA products.

(b) The Republic of the Philippines has been deprived of vital foreign exchange reserves because excessive amounts of foreign exchange have been required not only to pay for BSA and BSAP at the non-competitive prices charged by defendants or their licensees but also to enable defendants or their licensees to make remittances from the Philippines, in United States dollars or other foreign cur-

rencies, of their profits resulting from sales in the Philippines of BSA and BSAP at the non-competitive prices charged by them.

(c) Pfizer and Cyanamid have been able to maintain unchanged for prolonged periods their substantially identical, non-competitive, high prices of Terramycin products and Aureomycin products without any price competition from Tetracycline products.

(d) Pfizer, Cyanamid, Bristol, Upjohn and Squibb have been able to maintain unchanged for prolonged periods substantially identical, non-competitive, high prices of all BSA's and BSA products sold by them, and price competition in the sale and distribution of broad spectrum antibiotics and BSA products has been prevented and suppressed.

(e) Pfizer, Cyanamid, and Bristol, Squibb and Upjohn have been able to make non-competitive, high profits from the sale of their broad spectrum antibiotic products.

(f) Bristol has been able to make non-competitive, high profits in the sale of bulk Tetracycline.

(g) A judicial determination of the validity of Pfizer's Tetracycline patent has been prevented.

(h) Introduction of improved forms and methods of administration of broad spectrum antibiotics by other companies has been restricted and prevented and research in this field has been hampered.

(i) Pharmaceutical companies other than the defendant companies desiring to engage in the manufacture or sale of broad spectrum antibiotics or BSA products have been prevented and precluded from doing so.

(j) Other producers and sellers of broad spectrum antibiotics and BSA products have been precluded from effectively competing in the Philippines.

IX.

Judgments in Governmental Proceedings

77. On July 28, 1958, the Federal Trade Commission issued a Complaint against Pfizer, Bristol, Cyanamid, Squibb and Upjohn, charging, *inter alia*, that Pfizer made false, misleading and incorrect statements to, and withheld material information from, the United States Patent Office for the purpose and with the effect of inducing the issuance of a patent on Tetracycline. *In the Matter of American Cyanamid Co. et al.*, F.T.C. Docket No. 7211. The Complaint also alleged that Bristol and Cyanamid withheld from the Patent Office material information in the course of the prosecution of patent applications, as a result of which Pfizer was aided in obtaining its Tetracycline patent. It was further alleged that Cyanamid, Bristol, Squibb and Upjohn solicited and accepted licenses from Pfizer under the Tetracycline patent, knowing that material information had been withheld from the Patent Office by one or more of the defendants. The Complaint further alleged that all five defendants conspired and combined to fix and maintain prices of broad spectrum antibiotics, including Tetracy-

cline. On September 29, 1967, the Federal Trade Commission found that Pfizer had obtained the Tetracycline patent by material misrepresentation to, and withholding pertinent information from, the Patent Office; that Pfizer had attempted to monopolize Tetracycline; and that Cyanamid had also withheld material information from the Patent Office in connection with the issuance of the Tetracycline patent. The Commission found that Pfizer's conduct violated Section 2 of the Sherman Act and was therefore a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission further found that Cyanamid's conduct also violated Section 5 of the Federal Trade Commission Act. The Commission issued a final order directing Pfizer and Cyanamid to make licenses under their patents on Tetracycline and Aureomycin available to all other domestic companies on a specified royalty basis. On September 30, 1968, the United States Court of Appeals for the Sixth Circuit affirmed the decision and order of the Federal Trade Commission. *Charles Pfizer & Co.* v. *F.T.C.*, 401 F.2d 574 (6th Cir. 1968). Plaintiff's action is based in part upon the matters complained of and determined in this proceeding.

78. On August 17, 1961, the United States of America instituted a criminal prosecution, 61 Cr. 772, in the United States District Court for the Southern District of New York, naming Pfizer, Cyanamid and Bristol as defendants, and Squibb and Upjohn as co-conspirators. The three-count indictment alleged the same combination and conspiracy to restrain trade and to monopolize and monopolization which are the subject matter of the present action. On December

29, 1967, after a jury trial, defendants Pfizer, Cyanamid and Bristol were each found guilty of each of the violations charged. Judgments of conviction were entered and maximum fines imposed on February 28, 1968. On January 28, 1972, an equally divided Supreme Court affirmed an order of the Second Circuit, 437 F.2d 957, affirming 426 F.2d 32, that a new trial was required due to errors in the jury charge delivered by the District Court. Plaintiff's action is based in part upon the matters charged and determined in this proceeding.

X.

Fraudulent Concealment

79. Plaintiff had no knowledge of the violation alleged herein or of the facts which might have led to the discovery of the violation, until after the institution of the litigation referred to in paragraphs 77 and 78. Plaintiff could not have discovered the said antitrust violation at an earlier date by the exercise of due diligence, inasmuch as said antitrust violation had been fraudulently concealed from its inception by the defendants by various means and methods used to avoid the detection thereof. Said fraudulent concealment consisted in part of the following acts: misrepresenting material facts and withholding pertinent information from the Patent Office; tightly controlling the dissemination of documents containing relevant data and subsequently destroying these documents.

80. During the pendency of the litigation referred to in paragraphs 77 and 78 and the fraudulent concealment referred to in paragraph 79, the statute of limitations appli-

cable to the instant action (Clayton Act, Section 4B, 15 U.S.C. § 15b) has been and continues to be suspended as provided by statute and otherwise. (Clayton Act, Section 5(b), 15 U.S.C. § 16(b).)

XI.

Injury to Plaintiff

81. During the period of the defendants' violations of the Sherman Act, plaintiff and other members of the classes represented by plaintiff purchased broad spectrum antibiotics and BSA products from the defendants and others. By reason of said violations, plaintiff and other members of the classes represented by plaintiff have been denied the benefits of unrestricted competition, and have paid more for broad spectrum antibiotics and BSA products than they would have paid had defendants' violations not existed. As a result, plaintiff and other members of the class it represents have been inured and damaged in their business or property by defendant in an amount which presently is undetermined.

PRAYER

Wherefore, plaintiff prays that:

(1) this court adjudge and decree that the defendants, and each of them, have combined and conspired to restrain and to monopolize interstate and foreign trade and commerce in the manufacture, distribution and sale of broad spectrum antibiotics and BSA products, and have monopolized and attempted to monopolize such trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act;

(2) judgment entered in favor of plaintiff and the classes represented by plaintiff against the defendants, jointly and severally, for the injury and damage caused by defendants in an amount three-fold the actual damages sustained with interest thereon;

(3) this court allow, and defendants be required to pay, jointly and severally, the full costs of this suit, including as part thereof a reasonable fee for the services of plaintiff's atorneys; and

(4) plaintiff be granted such other, further, and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

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/s/ Ephraim Jacobs

/s/ Douglas V. Rigler

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

4-71 Civ. 435 D. of Minnesota
and the following action:

(Dist. of Columbia Civil Action No. 650-72)

In Re Coordinated Pretrial Proceedings
in Antibiotics Antitrust Action

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH
THE CENTRAL BANK OF THE PHILIPPINES,

Plaintiff,

v.

PFIZER, INC.; AMERICAN CYANAMID COMPANY; BRISTOL-MYERS COMPANY; SQUIBB, INC.; E. R. SQUIBB AND SONS, INC.; OLIN CORP.; and THE UPJOHN COMPANY,

Defendants.

Further Amendment to Complaint

The amended complaint of the Republic of the Philippines, dated December 14, 1973, is further amended by the addition of subparagraphs 51-A and 51-B, as follows:

51-A. Pfizer, in addition to acting in concert with other defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its

patent position, to secure for itself and to attempt to secure for itself, a monopoly in broad spectrum antibiotics, and particularly tetracycline, in the United States and abroad; further, Pfizer, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and tetracycline market.

51-B. Cyanamid, in addition to acting in concert with other defendants as alleged above, unilaterally has acted to mislead or defraud the U. S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in broad spectrum antibiotics, and particularly chlortetracycline, in the United States and abroad; further, Cyanamid, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and chlortetracycline market.

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January 8, 1974

[certificate of service omitted]

Defendants' Request for Certification, June 25, 1974.

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

4-71 Civ. 435

In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions

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4-71 Civ. 402

THE REPUBLIC OF VIETNAM,

Plaintiff,

v.

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB INC., E. R. SQUIBB & SONS, INC., OLIN CORPORATION and THE UPJOHN COMPANY,

Defendants.

4-74 Civ. 65

THE IMPERIAL GOVERNMENT OF IRAN,

Plaintiff,

v.

PFIZER INC., ET AL.,

Defendants.

4-72 Civ. 312

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,

Plaintiff,

v.

PFIZER INC., ET AL.,

Defendants.

Defendants' Request for Certification, June 25, 1974.

Request for Certification

Defendants hereby request this Court to certify, pursuant to 28 U.S.C. § 1292(b), its Miscellaneous Order 74-31, dated January 16, 1974, and its Miscellaneous Order No. *74-37*, dated June 17, 1974.*

In order to accomplish the certification for interlocutory appeal, it is first requested that this Court amend its Miscellaneous Order 74-31, dated January 16, 1974, entered in 4-72 Civ. 312 (the *Republic of the Philippines* action) to include the following language:

> "The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."**

The addition of this language is requested in order to satisfy the requirements of 28 U.S.C. § 1292(b).

It is also requested that this Court amend its Miscellaneous Order No. *74-37*, dated June 17, 1974, entered in 4-71 Civ. 402 and 4-74 Civ. 65 (the actions of the *Republic*

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* This Court has not entered an order on the "Person" question in the *Vietnam* action, but it has stated that its holding in the *Kuwait* action (69 Civ. 4091, S.D.N.Y.) also applies to the *Vietnam* case. No order has been entered upon this question in the *Iran* action. In both of those cases defendants have asserted by way of affirmative defenses that the governments bringing those suits are not "persons" authorized to do so under § 4 of the Clayton Act. Accordingly, the Court may wish to enter orders in the *Vietnam* and *Iran* actions in accordance with its previous rulings on the "Person" issue and then certify those orders under 28 U.S.C. § 1292(b) also.

** Rule 5(a) of the Federal Rules of Appellate Procedure provides, *inter alia:* "An order may be amended to include the prescribed statement at any time, and permission to appeal may be sought within 10 days after entry of the order as amended."

of Vietnam and the *Imperial Government of Iran*) to include the same necessary language previously quoted regarding the existence of a controlling question of law and the utility of an immediate appeal.

There can be no doubt that the immediate appeal of these orders may materially advance the ultimate termination of these cases: A decision in favor of defendants on the question of whether foreign sovereigns are "persons" within the meaning of § 4 of the Clayton Act would result in a dismissal of these cases. A decision in favor of defendants on the ability of foreign sovereigns to sue on behalf of their subjects would greatly simplify the trial of these cases in that the claims of these government plaintiffs would then be limited to their own purchases.

Nor does there seem to be room for argument over the proposition that the orders in question involve "controlling question[s] of law as to which there is substantial ground for a difference of opinion. . . ."

The Court has previously certified its holding that a foreign government is a "person" within the meaning of the antitrust laws in its Miscellaneous Order 71-13 in the *Kuwait* case, entered May 24, 1971. In that case, defendants' petition for permission to appeal was granted by the Second Circuit, but before the matter could be heard Kuwait dismissed its action. Moreover, the Republic of the Philippines has previously stated that it does not object to the Court's certification of the "person" as an important and controlling question of law appropriate for interlocutory appeal (Memorandum in Support of Motion to Bring Plaintiff's Action Within the Purview of Miscellaneous Order 71-13, or Bring Certain Defenses on for Prompt Hearing, or to Strike Certain Affirmative Defenses, dated June 19, 1972).

As to the issue whether the Governments of Iran and Vietnam may sue to recover treble damages claimed to have been suffered by their "citizens," as well as for the governments' own purchases, this Court has recognized that its Order would confer upon foreign governments a representative status in the litigation which our laws clearly deny to the Governments of the United States and the several states. The justification for such a startling result is apparently found by this Court in the fact that "the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States."

It is respectively submitted that the statement of the proposition is sufficient to demonstrate that it is clearly one "as to which there is substantial ground for difference of opinion . . ." which should be resolved now while it is still possible to avoid what may otherwise later prove to

have been unnecessary and substantial expenditures of time and money by the parties and by the Court.

Dated: June 25, 1974
New York, New York

Respectfully submitted,

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Complaint of the Government of India, October 11, 1974.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

No. Civ. 4-74-496

JURY TRIAL DEMANDED

In Re Coordinated Identical Proceedings in Antibiotic Antitrust Actions

THE GOVERNMENT OF INDIA,
Plaintiff,

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., and E. R. SQUIBB AND SONS, INC.,
Defendants.

Complaint

Plaintiff, the Government of India, appearing herein by its attorneys, brings this Complaint against Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc., and E. R. Squibb and Sons, Inc.

I

JURISDICTION AND VENUE

1. The jurisdiction of this Court to hear this Complaint is based upon the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of

Congress regulating commerce against restraint and monopolies," and, as hereinafter set forth, this controversy involves Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Act of July 2, 1890, Ch. 647, §§ 1 and 2, 26 Stat. 209, as amended; Sections 1, 4, 5, 7, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15, 16, 18, 22 and 26), Act of October 15, 1914, Ch. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, as amended; and rules and laws against fraud and deceit. Plaintiff sues for treble damages plus costs of suit and reasonable attorney's fees.

2. Each Defendant maintains an office, transacts business, is found, or has an agent within this district.

II

Plaintiff

3. Plaintiff, The Government of India (hereinafter GOI), is a sovereign foreign state with whom the United States of America maintains diplomatic relations.

4. Plaintiff, and Plaintiff's departments, agencies, commissions, institutions, instrumentalities and subdivisions, has purchased, directly and indirectly, substantial amounts of broad spectrum antibiotics and broad spectrum antibiotic products during the period in suit in transactions arising out of the foreign and/or interstate commerce of the United States of America.

III

Capacities in Which Plaintiff Sues

5. Plaintiff, on its own behalf and on behalf of its departments, agencies, commissions, institutions, instrumentalities and subdivisions, maintains this action as a direct and indirect purchaser of broad spectrum antibiotics and broad spectrum antibiotic products (hereinafter BSA and BSAP).

6. Plaintiff maintains this action as the representative of a class consisting of political subdivisions in India which purchased BSA and BSAP.

7. Plaintiff maintains this action as the representative of a class consisting of individual purchasers and consumers in India who purchased and consumed BSA and BSAP.

8. Plaintiff maintains this action as the representative of a class consisting of hospitals and clinics in India which purchased BSA and BSAP.

9. Plaintiff maintains this action as the representative of a class consisting of retailers and wholesalers in India who purchased BSA and BSAP.

10. Plaintiff maintains this action, in a *parens patriae* and proprietary capacity, for damages to its proprietary, commercial and business interests, including loss of foreign exchange, arising from purchases of BSA and BSAP.

11. Plaintiff maintains this action, in a *parens patriae* capacity, for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers and importers in India who purchased BSA and BSAP.

12. Plaintiff maintains this action, in a capacity as official representative of citizens, businesses, institutions and organizations in India, for direct out-of-pocket

damages suffered by such citizens, businesses, institutions and organizations due to purchases of BSA and BSAP.

13. Each of the above-mentioned classes is so numerous that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the GOI, as the representative of each class, are typical of the claims of each class. And the GOI will fairly and adequately represent each class.

14. This action will be dispositive of the interests of the members of the above-mentioned classes.

15. The questions of law and fact common to the members of each class predominate over questions involving only individual members, and a class action is superior to other available methods for the fair and efficient resolution of the controversy.

IV

Defendants

16. Defendant Pfizer, Inc. (hereinafter Pfizer) is a corporation organized and existing under the laws of the State of Delaware with principal offices located in New York, New York. Pfizer is the successor to and was formerly known as and transacted business under the name of Chas. Pfizer & Co., Inc. Pfizer is and was engaged in the manufacture, sale, and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including India. In its international manufacturing and sales activities, Pfizer sometimes operates and conducts business

through wholly or substantially owned foreign or domestic subsidiaries.

17. Defendant American Cyanamid Company (hereinafter Cyanamid) is a corporation organized and existing under the laws of the State of Maine with principal offices located in New York, New York. Cyanamid is and was engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including India. In its international manufacturing and sales activities, Cyanamid sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

18. Defendant Bristol-Myers is a corporation organized and existing under the laws of the State of Delaware whose principal offices are located in New York, New York. The activities of Bristol-Myers in the pharmaceutical field are carried on by Bristol Laboratories Division. Prior to December 1959, the business and assets of the Bristol Laboratories Division were operated as a wholly owned subsidiary of Bristol-Myers Company. Defendant Bristol-Myers Company and Bristol Laboratories, Inc., are hereinafter severally and jointly referred to as "Bristol" unless otherwise indicated. Bristol is and was engaged in the manufacture, sale and distribution of various drug products including BSA and BSAP, which business is conducted in the United States and throughout the world, including India. In its international manufacturing and sales activities, Bristol sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

19. Defendant Upjohn Company (hereinafter Upjohn) is a corporation organized and existing under the laws of the State of Michigan with principal offices located in Kalamazoo, Michigan. Upjohn was and is engaged in the manufacture, sale and distribution of various drug products, including BSA and BSAP, which business is conducted in the United States and throughout the world, including India. In its international manufacturing and sales activities, Upjohn sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

20. Olin Corporation is a corporation organized and existing under the laws of the Commonwealth of Virginia with its principal offices located in New York, New York. Olin is the successor to and formerly was known as and transacted business under the name Olin Mathieson Chemical Corporation. Until approximately January 1968, Olin was engaged in the manufacture, sale and distribution of various drug products, including BSA, which business was conducted in the United States and throughout the world, including India. In its international manufacturing and sales activities, Olin sometimes operated and conducted business through wholly or substantially owned foreign or domestic subsidiaries.

21. Squibb, Inc., is a corporation organized and existing under the laws of the State of Delaware, with its principal offices and place of business located at 460 Park Avenue, New York, New York.

22. E. R. Squibb & Sons, Inc. (sometimes hereinafter referred to as Squibb) is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located in New York, New York. E. R. Squibb & Sons, Inc., is a wholly owned subsidiary of Squibb, Inc., and is engaged in the manufacture, sale and distribution of various drug products including BSA and BSAP, in the United States and throughout the world, including India. Prior to approximately January 1, 1966, the business and assets of E. R. Squibb & Sons, Inc., were operated as the Squibb Division of the defendant Olin. Effective January 1, 1966, Olin transferred all assets and liabilities relating to its pharmaceutcial operations to E. R. Squibb, Inc., a wholly owned subsidiary. In September 1967, Olin and Beech-Nut Life Savers, Inc. (Beech-Nut) agreed upon a merger of E. R. Squibb & Sons, Inc., and Beech-Nut. In anticipation of the merger, Olin transferred all the capital stock of its subsidiary E. R. Squibb & Sons, Inc., in exchange for all of the stock of Squibb, Inc., a corporation newly organized for purposes of effectuating the merger. Immediately prior to the merger, Olin distributed its entire interest in Squibb, Inc., to Olin's stockholders on a pro rata basis. On January 15, 1968, Beech-Nut was merged into Squibb Enterprises, Inc., a wholly owned subsidiary of Squibb, Inc., and the stockholders of Beech-Nut received shares of Squibb, Inc., in exchange for their stock. The name of Squibb, Inc., was changed to Squibb Beech-Nut, Inc., which on April 30, 1971, changed its name to Squibb, Inc. Squibb, Inc. operates through four major subsidiaries: E. R. Squibb & Sons, Inc.; Beech-Nut, Inc.; Dobbs House, Inc.; and Lanvin-Charles of the Ritz, Inc. As a result of these transactions, the assets formerly held by E. R. Squibb & Sons, Inc., the Olin subsidiary, are now held by the defendant E. R. Squibb & Sons, Inc., which

is a newly organized, wholly owned subsidiary of Squibb, Inc. In its international manufacturing and sales activities, Squibb sometimes operates and conducts business through wholly or substantially owned foreign or domestic subsidiaries.

V

DEFINITIONS

23. As used herein:

a. The term "antibiotics" means chemical substances produced by a microorganism, or by chemical synthesis, which have the capacity to inhibit the growth of other harmful microorganisms or to destroy them.

b. The term "broad spectrum antibiotics" (sometimes herein referred to as BSA) means antibiotics which are effective against a wide range of harmful microorganisms, including gram positive and gram negative pathogenic microorganisms, rickettsiae, viruses, spirochetes and protozoa. BSA includes tetracycline, chlortetracycline, oxytetracycline, doxycycline, minocycline, demeclocycline and methacycline.

c. The term "Tetracycline" means the generic name of the broad spectrum antibiotic whose chemical name and structures are 4-dimethylamino—1, 4, 4a, 5, 5a, 6, 11, 12a—octahydro—3, 6, 10, 12, 12a—pentahydroxy—6 methyl—1, 11—dioxo—2 napththa-cene carboxamide and salts, hydrates, esters, complexes and analogs thereof.

d. The term "Aureomycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Cyanamid whose generic name is chlortetracycline, and salts and analogs thereof.

e. The term "Terramycin" means the brand name of the broad spectrum antibiotic manufactured and sold by Pfizer, whose generic name is oxytetracycline, and salts and analogs thereof.

f. The term "Chloromycetin" means the brand name of the broad spectrum antibiotic manufactured and sold by Parke, Davis & Co., whose generic name is chloramphenicol.

g. The term "Products" shall mean any product in the form in which it is sold to retail and wholesale sellers of drugs, hospital, surgical and dental supply houses, doctors, dentists, hospitals, clinics, and government agencies and government institutions, or any one of them. "BSAP" as hereinafter sometimes used shall mean broad spectrum antibiotic products.

h. The term "bulk form" means the chemical form in which a pharmaceutical product is manufactured but which requires packaging in dosage form so as to render it suitable for sale to the drug trade and dispensing to the ultimate consumer.

VI

NATURE OF TRADE AND COMMERCE

24. BSAP are widely used by the medical profession in the treatment of human infectious diseases. They are effective against a wide range of infectious diseases. BSA

are used and sold throughout the world and are regularly shipped within and from the United States in interstate and foreign commerce.

25. During most of the period covered by this Complaint, the BSAP market consisted of (a) Aureomycin, (b) Terramycin, (c) Tetracycline, and (d) Chloromycetin. All four are effective against substantially the same range of pathogenic microrganisms and are substantially interchangeable in medical use. Aureomycin, Terramycin and Chloromycetin have closely similar molecular structures.

26. The first broad spectrum antibiotic sold in the United States was chlorotetracycline. Since December 1948, Cyanamid has marketed this product under the trade name "Aureomycin". On September 14, 1949, Cyanamid, as the assignee of the Duggar application, received U.S. Patent No. 2,482,055 on "Aureomycin and the preparation of same." On September 2, 1952, Cyanamid, as the assignee of the Niedercorn application, received U.S. Patent No. 2,609,329, which was an improvement patent on the process for producing Aureomycin.

27. On October 4, 1949, Parke, Davis & Co. received U.S. Patent No. 2,483,885 on the broad spectrum antibiotic chloramphenicol; and since 1949 it has marketed the product under the trade name Chloromycetin.

28. On July 18, 1950, Pfizer received U.S. Patent No. 2,516,080 on the broad spectrum antibiotic oxytetracycline; and since 1950 it has marketed the product under the trade name of Terramycin.

29. On January 11, 1955, Pfizer, as assignee of the Conover application, received U.S. Patent No. 2,699,054 on the broad spectrum antibiotic Tetracycline.

30. Tetracycline is manufactured by one of two principal methods: (1) a process which subjects chlortetracycline to hydrogenation in the presence of a catalyst which removes the chlorine atom from the molecule, and (2) by a direct fermentation process. At the outset of their manufacture of Tetracycline and for a substantial period of time thereafter, Pfizer and Cyanamid used the hydrogenation process while Bristol used the direct fermentation process.

31. During much of the period covered by this Complaint, Tetracycline was manufactured only by Pfizer, Cyanamid and Bristol. In the United States, Tetracycline was not manufactured by any manufacturer other than Pfizer, Cyanamid and Bristol until late in 1962.

32. Cyanamid has been licensed by Pfizer to manufacture and sell Tetracycline since the issuance of the Conover patent on January 11, 1955. Bristol has been licensed by Pfizer to manufacture and sell Tetracycline since March 28, 1956. Upjohn and Squibb have been licensed to sell some Tetracycline products since March 28, 1956, pursuant to the terms of an agreement between each of them and Pfizer.

33. For a substantial portion of the time covered by this Complaint, Tetracycline products were sold in the U.S. and abroad only by Pfizer, Cyanamid, Bristol, Upjohn and Squibb. Cyanamid commenced selling Tetracycline products in November 1953; Pfizer, in January 1954; Bristol, in April 1954; Squibb in September 1954; and Upjohn in October 1954.

34. For many years commencing in 1954, Upjohn and Squibb purchased all their bulk Tetracycline from Bristol, which, for a substantial period of time covered by this Complaint, was the only seller of bulk Tetracycline.

35. Each of the defendant companies sells Tetracycline products under its own brand or trade name. All use substantially identical dosage forms. The introductory brand names used by Defendants for their Tetracycline products were Cyanamid's "Achromycin"; Pfizer's "Tetracyn"; Bristol's "Polycycline"; Squibb's "Steclin"; and Upjohn's "Panmycin".

36. Cyanamid did not license anyone to manufacture and sell Chlortetracycline in the U.S., and for many years it limited its licenses abroad to its subsidiary companies.

37. Pfizer did not license anyone to manufacture and sell oxytetracycline in the U.S. and limited its licenses abroad to its subsidiary companies.

38. Parke, Davis & Co. did not license anyone to manufacture and sell chloramphenicol in the U.S. and limited its licenses abroad to its subsidiary companies.

39. As a result, Cyanamid, Pfizer and Parke, Davis enjoyed a monopoly on the production and sale of their respective BSA in the United States.

40. Cyanamid and Pfizer each applied for and obtained foreign counterpart patents for chlortetracycline and oxytetracycline respectively and Pfizer for tetracycline and each company sought and received many foreign counterpart patents for improvements and process patents for the manufacture of these drugs and other subsequently developed BSA.

41. Bristol applied for and received foreign counterpart patents for the production or process or manufacture of certain BSA or BSAP; and in certain foreign countries

Bristol obtained a product patent on Tetracycline, notwithstanding its failure to obtain such a patent in the United States.

42. As a result of obtaining the aforesaid U.S. and foreign counterpart patents and their policy not to license others to manufacture or sell these BSA, Pfizer, Cyanamid, Bristol, and Parke, Davis enjoyed a monopoly on the production and sale of these antibiotics throughout much of the world.

43. Tetracycline is the most widely used broad spectrum antibiotic. In the United States sales of Tetracycline products in 1954 amounted to about $39,500,000. In 1957 these sales totaled approximately $114,000,000 and in 1959 the amount sold was $95,000,000.

44. BSAP are sold by Defendants to customers who are classified in the U.S. market as either retail druggists, wholesalers, private hospitals, tax-supported hospitals, or federal government agencies. All Defendants sell directly to these classifications except that Upjohn has not always sold directly to wholesalers.

45. Within the United States, prices of all BSAP remained substantially unchanged from October 1951 to at least July 1960 to the retailer, wholesaler and hospital classifications.

46. International pricing and sales policies for BSA and BSAP are coordinated and controlled by each Defendant's respective management within the United States. Sales and price policies of Defendant's overseas subsidiaries engaged in the manufacture or sale of BSA or BSAP are reviewed by each Defendant's respective management with-

in the United States and are subject to the control of management within the United States.

47. Patent licensing agreements and bulk sales agreements between Defendants and manufacturers or sellers of BSA and BSAP outside of the United States are reviewed and approved by each Defendant's respective management within the United States. Such agreements relating to BSA and BSAP are frequently negotiated within the United States.

48. Substantial quantities of BSA and BSAP manufactured by Defendants in the United States have been sold and shipped to customers outside of the United States, including customers in India.

49. Some BSA and BSAP purchased from the Defendants by customers in India may have been manufactured outside of the United States by Defendants' wholly or partially owned subsidiaries.

50. Some BSA and BSAP purchased by customers in India may have been manufactured outside of the United States by licensees of Defendants. Such licensees pay or paid royalties to Defendants based upon the use of Defendants' U.S. BSA patents and their foreign counterparts. These patents include but are not limited to the foreign counterpart patents of U.S. Patent No. 2,600,054 (Conover); U.S. Patent No. 2,482,055 (Duggar); U.S. Patent No. 2,609,329 (Niedercorn); U.S. Patent No. 2,734,018 (Minieri); U.S. Patent No. 3,092,556; Reissue RE 25,840 (Growich).

VII

Background of the Conspiracy

51. In 1952 Pfizer's Terramycin product sales in the United States totaled over $39,000,000. Cyanamid's Aureomycin product sales in the United States totaled over $38,000,000. These sales amounted to approximately 78 percent of the broad spectrum product market in 1952.

52. In 1953 Pfizer's Terramycin product sales in the United States totaled over $36,500,000. Cyanamid's Aureomycin product sales in the United States were about $32,000,000. These sales amounted to approximately 92 percent of the broad spectrum product market in 1953.

53. As of November 1953, prices of the narrow spectrum antibiotics such as penicillin and streptomycin, which were not patented and were sold by numerous companies, were severely depressed. Each of the defendant companies engaged or had been engaged in the manufacture or sale of such narrow spectrum antibiotics.

54. As of November 1953, Bristol Laboratories, Inc., a then wholly owned subsidiary of Bristol (and presently an operating division thereof) was operating at a loss by reason of the continued decline in the sales price of penicillin which then constituted the major part of the total business of Bristol Laboratories, Inc.

55. As of November 1953, prices of the BSAP then on the market, all patented, were all substantially identical and non-competitive, and had all been maintained at the price level in effect on October 1, 1951.

56. As of November 1953, patent applications on Tetracycline, filed in 1953 by Pfizer, Cyanamid and Bristol severally, were pending in the Patent Office. Pfizer's pending application was a continuation of a previous application rejected by the Patent Office.

57. On September 23, 1953, Heyden Chemical Company filed an application for a patent on Tetracycline. This application was acquired by Cyanamid in December 1953 after arrangements for its acquisition had been completed in November 1953.

58. On or about October 29, 1953, Pfizer and Cyanamid were informed by the Patent Office that an interference would probably be declared on their respective Tetracycline patent applications.

59. By October 1953, Pfizer knew that Cyanamid was interested in Tetracycline and was testing it clinically. Cyanamid also knew that Pfizer was interested in Tetracycline.

60. As of November 1953, Pfizer and Cyanamid knew that Tetracycline was directly competitive with Terramycin and Aureomycin respectively, and that Tetracycline represented a threat to the continuation of their dominant positions and high profits in the then existing BSAP market. Pfizer and Cyanamid also knew that unless one of them could obtain a product patent on Tetracycline, prices of the BSAP could become competitive.

61. In 1954, Bristol had a very small sales force selling pharmaceuticals directly to the drug trade. Upjohn and Squibb, at such time, each had a very large sales force

engaged in the direct sale of pharmaceuticals to the drug trade.

62. Prior to the introduction of Tetracycline products, Cyanamid was manufacturing and selling Aureomycin, ostensibly pursuant to coverage under the Duggar and Niedercorn patents and Cyanamid purportedly had the ability to exclude other companies from the Aureomycin market through the assertion of these patents. In applying for these patents and during the processing of these patent applications, Cyanamid did not disclose the best known mode and manner of its invention and thereby obtained these patents by knowing and willful non-compliance with Patent Office requirements. Accordingly, there is substantial reason to believe that these patents are invalid and unenforceable.

63. Cyanamid's Growich and Minieri patent applications did not conform with Patent Office rules and standards which may render these patents invalid and unenforceable.

VIII

Violations of Law

64. Beginning in or about November 1953, the exact date being unknown to Plaintiff, the Defendants have engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture, sale and distribution of BSA and BSAP, have combined and conspired to monopolize such interstate and foreign trade and commerce and have attempted to monopolize and monopolized such trade and commerce in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and

2), and Section 7 of the Clayton Act (15 U.S.C. § 18); and have violated rules and laws against fraud and deceit.

The substantial terms of the aforesaid violations have been and are that:

a. The manufacture of Tetracycline be confined to Pfizer, Cyanamid and Bristol in the United States and to a limited number of licensees abroad.

b. The sale of Tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn and Squibb in the United States and to a limited number of licensees abroad.

c. The sale of bulk Tetracycline be confined to Bristol and bulk Tetracycline be sold by Bristol only to Upjohn and Squibb in the United States and Defendants' bulk sales abroad would be to a limited and controlled number of customers.

d. The sale of BSAP by the defendant companies, their subsidiaries and their licensees and/or bulk customers in the United States and abroad be at substantially identical and non-competitive prices.

65. Pfizer, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Tetracycline, in the United States and abroad; further, Pfizer, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Tetracycline market.

66. Cyanamid, in addition to acting in concert with other Defendants as alleged above, unilaterally has acted to mislead or defraud the U.S. Patent Office, and has utilized its patent position, to secure for itself, and to attempt to secure for itself, a monopoly in BSA, and particularly Chlortetracycline, in the United States and abroad; further, Cyanamid, in reliance on said patent position, has engaged in acts in restraint of domestic and foreign trade and commerce in order to obtain and exploit this monopoly, and attempted monopoly, of the broad spectrum antibiotic and Chlortetracycline market.

67. The said violations have been effectuated by various means and methods including, but not limited to, those alleged in paragraphs 68 through 90 of this Complaint.

68. Cyanamid licensed Pfizer and Bristol to use its Aureomycin patent in the manufacture of Tetracycline and refused to license all other domestic and most foreign applicants.

69. Pfizer licensed Cyanamid and Bristol under its Tetracycline patent and refused to license all other domestic and most foreign applicants.

70. Cyanamid assisted and cooperated with Pfizer in obtaining for Pfizer a patent on Tetracycline.

71. Pfizer, Cyanamid and Bristol suppressed litigation involving the validity of Pfizer's Tetracycline patent.

72. Pfizer, Cyanamid and Bristol withheld pertinent and material information from the Patent Office and otherwise misled the Patent Office prior to the issuance of Pfizer's Tetracycline patent.

73. Cyanamid acquired the competing Heyden patent application on Tetracycline and abandoned the product claims therein.

74. Bristol sold bulk Tetracycline only to Upjohn and Squibb. For a substantial period of time covered by this Complaint, each of the defendant companies refused to sell bulk Tetracycline to all others except that Cyanamid sold a large amount of bulk Tetracycline to Pfizer in early 1954 in assisting Pfizer to make a prompt entry into the Tetracycline product market.

75. Bristol entered into agreements with Upjohn and Squibb, respectively, which required Upjohn and Squibb to purchase all their requirements of bulk Tetracycline from Bristol.

76. Pfizer issued licenses to Upjohn and Squibb, respectively, limited, however, at Bristol's request, to the sale of Tetracycline products.

77. Pfizer and Cyanamid have maintained substantially identical, non-competitive prices on Terramycin products and Aureomycin products, respectively.

78. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market at prices which were substantially identical with each other and which conformed to the non-competitive prices of Terramycin products and Aureomycin products in effect as of November 1953, and all these companies thereafter maintained such substantially identical, non-competitive prices.

79. Pfizer, Cyanamid, Bristol, Upjohn and Squibb each introduced its Tetracycline products on the market in

dosage forms and customer classifications substantially identical with the Terramycin product and Aureomycin product dosage forms and customer classifications in effect as of November 1953, and have continued to use such substantially identical dosage forms and classifications.

80. Defendants have communicated with one another and advised one another both in the United States and throughout the world with respect to current and future prices of BSAP.

81. Defendants have jointly sought to restrict or inhibit the purchase of BSA and BSAP which were not manufactured by one of the Defendants.

82. Defendants have consulted with respect to action to inhibit or foreclose the purchase of BSA and BSAP in their generic form and have jointly acted to inhibit or foreclose such purchases.

83. Defendants have jointly agreed as to which patents on BSA and BSAP would be maintained on a worldwide (country-by-country) basis.

84. Defendants have advised and consulted with each other with respect to which of them would bring patent infringement actions or threatened such actions and under which patent relating to BSAP such legal action or threat of legal action would be based in order to prevent the sale of BSA or BSAP by companies other than the Defendants or their licensees.

85. Defendants have threatened to bring and have brought legal actions to prevent the sale of BSA or BSAP by persons other than Defendants or their licensees not-

withstanding Defendants' knowledge that patents relied upon in such lawsuits were fraudulently obtained or were being misused.

86. Defendants have entered into understandings, express or implicit, among themselves and their licensees that certain Defendants or certain of their licensees would not compete in some markets or areas of the world.

87. Defendants have established or attempted to establish worldwide or area prices concerning and governing the sale of BSAP.

88. Defendants have knowingly disparaged the quality of competitive products and have sought to convince prospective customers that competitive BSAP were inferior notwithstanding Defendants' knowledge of the falsity of such assertions or statements.

89. Defendants have purchased or attempted to purchase additional fermentation capacity or entered into bulk purchase contracts with other fermenters thus giving them control over competitive fermentation capacity for BSA and BSAP.

90. Defendants have sold BSA and BSAP on the express or implicit understanding that such products would not be re-exported in any form outside of the country in which they were originally sold.

IX

Effects of the Violations

91. The violations hereinbefore alleged have had the following effects on interstate and foreign commerce, among others:

a. The GOI and its political subdivisions, individual consumers, hospitals and clinics, retailers, wholesalers and importers in India, have all been deprived of the benefits of competition and have been compelled to pay high, non-competitive prices for BSA and BSAP.

b. The GOI has been deprived of vital foreign exchange reserves because excessive amounts of foreign exchange have been required not only to pay for BSA and BSAP at the non-competitive prices charged by Defendants or their licensees but also to enable Defendants or their licensees to make remittances from India, in United States dollars or other foreign currencies, of their profits resulting from sales in India of BSA and BSAP at the non-competitive prices charged by them.

c. Pfizer and Cyanamid have been able to maintain unchanged for prolonged periods their substantially identical, non-competitive, high prices of Terramycin products and Aureomycin products without any price competition from Tetracycline products.

d. Pfizer, Cyanamid, Bristol, Upjohn and Squibb have been able to maintain unchanged for prolonged periods substantially identical, non-competitive, high prices of all BSA and BSAP sold by them, and price competition in the sale and distribution of BSA and BSAP has been prevented and suppressed.

e. Pfizer, Cyanamid, Squibb and Upjohn have been able to make non-competitive, high profits from the sale of their BSAP.

f. Bristol has been able to make non-competitive, high profits in the sale of bulk Tetracycline.

g. A judicial determination of the validity of Pfizer's Tetracycline patent has been prevented.

h. Introduction of improved forms and methods of administration of BSA by other companies has been restricted and prevented, and research in this field has been hampered.

i. Pharmaceutical companies other than the defendant companies desiring to engage in the manufacture or sale of BSA or BSAP have been prevented and precluded from doing so.

j. Other producers and sellers of BSA and BSAP have been precluded from effectively competing in India.

X

Judgments in Governmental Proceedings

92. On July 28, 1958, the Federal Trade Commission issued a Complaint against Pfizer, Bristol, Cyanamid, Squibb and Upjohn, charging, *inter alia*, that Pfizer made false, misleading and incorrect statements to, and withheld material information from, the United States Patent Office for the purpose and with the effect of inducing the issuance of a patent on Tetracycline. *In the Matter of American Cyanamid Co., et al.*, F.T.C. Docket No. 7211. The Complaint also alleged that Bristol and Cyanamid withheld from the Patent Office material information in the course of the prosecution of patent applications, as a result of which Pfizer was aided in obtaining its Tetracycline patent.

It was further alleged that Cyanamid, Bristol, Squibb and Upjohn solicited and accepted licenses from Pfizer under the Tetracycline patent, knowing that material information had been withheld from the Patent Office by one or more of the Defendants. The Complaint further alleged that all five Defendants conspired and combined to fix and maintain prices of BSA, including Tetracycline. On September 29, 1967, the Federal Trade Commission found that Pfizer had obtained the Tetracycline patent by material misrepresentation to, and withholding pertinent information from, the Patent Office; that Pfizer had attempted to monopolize Tetracycline; and that Cyanamid had also withheld material information from the Patent Office in connection with the issuance of the Tetracycline patent. The Commission found that Pfizer's conduct violated Section 2 of the Sherman Act and was therefore a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission further found that Cyanamid's conduct also violated Section 5 of the Federal Trade Commission Act. The Commission issued a final order directing Pfizer and Cyanamid to make licenses under their patents on Tetracycline and Aureomycin available to all other domestic companies on a specified royalty basis. On September 30, 1968, the United States Court of Appeals for the Sixth Circuit affirmed the decision and order of the Federal Trade Commission. *Charles Pfizer & Co. v. F.T.C.*, 401 F.2d 574 (6th Cir. 1968). Plaintiff's action is based in part upon the matters complained of and determined in this proceeding.

93. On August 17, 1961, the United States of America instituted a criminal prosecution, 61 Cr. 772, in the United States District Court for the Southern District of New York, naming Pfizer, Cyanamid and Bristol as defendants,

and Squibb and Upjohn as co-conspirators. The three-count indictment alleged the same combination and conspiracy to restrain trade and to monopolize and monopolization which are the subject matter of the present action. On December 29, 1967, after a jury trial, defendants Pfizer, Cyanamid and Bristol were each found guilty of each of the violations charged. Judgments of conviction were entered and maximum fines imposed on February 28, 1968. On January 28, 1972, an equally divided Supreme Court affirmed an order of the Second Circuit, 437 F.2d 957, affirming 426 F.2d 32, that a new trial was required due to errors in the jury charge delivered by the District Court. Plaintiff's action is based in part upon the matters charged in this proceeding.

XI

Fraudulent Concealment

94. Plaintiff had no knowlede of the violations alleged herein or of the facts which might have led to the discovery of the violations, until after the institution of the litigation referred to in paragraphs 92 and 93. Plaintiff could not have discovered the said antitrust violations at an earlier date by the exercise of due diligence, inasmuch as said antitrust violations had been fraudulently concealed from their inception by the Defendants by various means and methods used to avoid the detection thereof. Said fraudulent concealment consists in part of the following acts: misrepresenting material facts and withholding pertinent information from the Patent Office; tightly controlling the dissemination of documents containing relevant data and subsequently destroying these documents.

95. During the pendency of the litigation referred to in paragraphs 92 and 93 and the fraudulent concealment referred to in paragraph 94, the statute of limitations applicable to the instant action (Clayton Act, Section 4(b), 15 U.S.C. § 15(b)) has been and continues to be suspended as provided by statute and otherwise. Clayton Act, Section 5(b), 15 U.S.C. § 16(b).

XII

Injury to Plaintiff

96. During the period of the Defendants' violations of the Sherman Act, Plaintiff and other members of the classes represented by Plaintiff purchased BSA and BSAP from the Defendants and others. By reason of said violations, Plaintiff and other members of the classes represented by Plaintiff have been denied the benefits of unrestricted competition, and have paid more for BSA and BSAP than they would have paid had Defendant's violations not existed. As a result, Plaintiff and other members of the classes it represents have been injured and damaged in their business or property by Defendants in an amount which presently is undetermined.

PRAYER

Wherefore, Plaintiff prays that:

(1) this Court adjudge and decree that the Defendants, and each of them, have combined and conspired to restrain and monopolize interstate and foreign trade and commerce in the manufacture, distribution and sale of BSA and BSAP; have each of them restrained such trade and commerce; and have monopolized and attempted to monopolize

Complaint of the Government of India, October 11, 1974.

such trade and commerce, as hereinbefore alleged, in violation of Sections 1 and 2 of the Sherman Act; have violated Section 7 of the Clayton Act; and have violated rules and laws against fraud and deceit;

(2) judgment be entered in favor of Plaintiff and the classes represented by Plaintiff against the Defendants, jointly and severally, for the injury and damage caused by Defendants in an amount threefold the actual damages sustained with interest thereon;

(3) this Court allow and Defendants be required to pay, jointly and severally, the full costs of this suit, including as part thereof a reasonable fee for the services of Plaintiff's attorneys; and

(4) Plaintiff be granted such other, further, and different relief as the nature of the case may require and as may seem just and appropriate to this Court.

KIRKWOOD, KAPLAN, RUSSIN & VECCHI
Counsel for Plaintiff
1218 Sixteenth Street, N.W.
Washington, D. C. 20036.

By /s/ LAWRENCE R. VELVEL
Lawrence R. Velvel

JURY DEMAND

Please take notice that Plaintiff demands a trial by jury, pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, of all issues triable of right by a jury.

Dated October 11, 1974

Defendants' Notice of Motion to Dismiss the Complaint of the Government of India, October 17, 1974.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civ. 4-74-496

THE GOVERNMENT OF INDIA,

Plaintiffs,

—against—

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., and E. R. SQUIBB & SONS, INC.,

Defendants.

Notice of Motion

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Peter Dorsey, Esq. and the complaint herein, defendants will move before the Honorable Miles W. Lord, United States District Judge, at 10:00 A.M., or as soon thereafter as counsel may be heard, on October 22, 1974, in Courtroom 1, United States Court House, Minneapolis, Minnesota, for an order, pursuant to Rule 12(b) (6), F.R. Civ. P., dismissing the above-captioned action for failure to state a claim upon which relief can be granted, on the ground that the complaint fails to state a claim under Section 4 of the Clayton Act (15 U.S.C. § 15) because plaintiff, a foreign government, is not a "person" entitled to sue

under that statute. If the Court should deny this motion, defendant will request that it promptly certify its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Dated: October 17, 1974

Yours, etc.

DORSEY, MARQUART, WINDHORST, WEST & HALLADAY
2400 First National Bank Bldg.
Minneapolis, Minnesota 55402

DONOVAN LEISURE NEWTON & IRVINE
30 Rockefeller Plaza
New York, New York 10020

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Los Angeles, California 90071

MAUN, HAZEL, GREEN, HAYES, SIMON & ARETZ
322 Hamm Building
St. Paul, Minnesota 55102

Attorneys for Pfizer Inc.

FAEGRE & BENSON
Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Bristol-Myers Company, Squibb Corporation, Olin Corporation and The Upjohn Company

WINTHROP, STIMSON, PUTNAM & ROBERTS
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Attorneys for Bristol-Myers Company

CRAVATH, SWAINE & MOORE
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New York, New York 10005
Attorneys for Squibb Corporation and Olin Corporation

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
Attorneys for The Upjohn Company

TO: LAWRENCE R. VELVEL, ESQ.
KIRKWOOD, KAPLAN, RUSSIN & VECCHI
1218 Sixteenth Street, N.W.
Washington, D.C. 20036
Attorneys for Plaintiff

Affidavit of Peter Dorsey

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-74-496

THE GOVERNMENT OF INDIA,

Plaintiff,

—against—

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., and E. R. SQUIBB & SONS, INC.,

Defendants.

STATE OF MINNESOTA }
COUNTY OF HENNEPIN } ss.

PETER DORSEY, being duly sworn, deposes and says:

1. I am a member of the firm of Dorsey, Marquart, Windhorst, West & Halladay, counsel for defendant American Cyanamid Company. I am familiar with the proceedings in *In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions* (4-71 Civ. 435) and with the complaint in the above-captioned action by the Government of India ("India"). A copy of India's complaint, which was delivered to me by a United States Marshall on October 15, 1974, is annexed as Exhibit A to this affidavit.

2. On information and belief, the plaintiff Government of India is a sovereign foreign state, which in terms of population and geographic area is one of the largest in the world. In its complaint (¶ 3), plaintiff alleges that it is "a sovereign foreign state."

3. India's complaint is substantially identical with those filed in actions brought by the Republic of Vietnam ("Vietnam") (4-71 Civ. 402) and by the Imperial Government of Iran ("Iran") (4-74 Civ. 65), and is closely similar to that filed in the action brought by the Republic of the Philippines by and through the Central Bank of the Philippines ("the Philippines") (4-72 Civ. 312). India, like Vietnam and Iran, alleges itself to be suing for itself and in a "*parens patriae*" capacity upon the individual claims of its nationals. Furthermore, like Vietnam, India alleges itself to be the "official representative" of its citizens' individual claims. (Complaint, ¶¶ 5, 10, 11, 12). India, like the other three foreign governments, also asserts various internal classes pursuant to Rule 23, F.R. Civ. P. (Complaint, ¶¶ 5, 6, 7, 8, 9, 13, 14, 15).

4. Counsel for India, the law firm of Kirkwood, Kaplan, Russin & Vecchi, as represented by Mr. Lawrence Velvel, is also counsel for Vietnam. Mr. Velvel's partner, Mr. Julius Kaplan, was signatory to the original Vietnam complaint and has participated in the *Vietnam* action ever since its inception.

5. By its Miscellaneous Orders 71-13 and 74-31, this Court has already ruled in other foreign government cases that a foreign government, such as India, is a "person" within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15) and therefore may maintain a suit for treble damages under that Act. By its Miscellaneous Order 74-39, this Court denied a request by defendants in other foreign government cases to certify its decision on the "person" question for interlocutory appeal pursuant to 28 U.S.C.

§ 1292(b). Counsel for Vietnam and India actively participated in and is fully familiar with written and oral arguments on the "person" question which have been previously presented to this Court.

6. By an order dated October 1, 1974 (in Docket No. 74-1680), the United States Court of Appeals for the Eighth Circuit requested briefing upon the foreign government "person" question and certain other issues raised by a combined petition for an extraordinary writ and for leave for permission to take an interlocutory appeal under 28 U.S.C. § 1292(b) which was filed on September 16, 1974 in the Court of Appeals by the defendants in the other foreign government cases. Counsel for Vietnam (who also represents India) has already submitted a response upon the "person" question to the Court of Appeals and will shortly be required to submit a brief on that question as well.

7. During the August 7, 1974, pretrial conference in *In Re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, this Court said that it would immediately certify the "person" question for interlocutory appeal if another foreign government suit were to be filed:

> "However, I will state that as to any future case filed I will immediately certify that question for appeal. Any future foreign government cases I will immediately certify that question for appeal, just on any preliminary motion that you might bring." (Trans., August 7, 1974 at 37-38).

8. Another foreign government case has now been filed. Since its counsel is already entirely familiar with the merits

Defendants' Notice of Motion to Dismiss the Complaint of the Government of India, October 17, 1974.

of the "person" question, and has previously fully argued the point, it is defendants' position that that issue is ripe for immediate hearing and decision in this case, and (should the decision be contrary to them) for interlocutory appeal under 28 U.S.C. § 1292(b).

/s/ Peter Dorsey
PETER DORSEY

Sworn before me this
17th Day of October, 1974

MARY ANN HINTZ
Notary Public

[Certificate of service omitted in printing.]

"Appendix A" to Brief for Respondent Republic of the Philippines, January 8, 1975, in *Pfizer Inc., et al.* v. *Lord and the Republic of Viet Nam, et al.*, 8th Circuit No. 74-1680, resubmitted to the Court of Appeals herein.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 74-1680

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY,

Defendants-Petitioners,

—against—

HONORABLE MILES W. LORD,
United States District Judge,

Respondent,

—and—

THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, and THE REPUBLIC OF THE PHILIPPINES By and Through THE CENTRAL BANK OF THE PHILIPPINES,

Plaintiffs-Respondents.

ON APPEAL FROM, AND PETITION FOR AN EXTRAORDINARY WRIT DIRECTED TO, THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

APPENDIX A

PREFACE

Exhibits 1, 9, 10, 15 and 16 of this appendix were obtained from respondent's files. All other exhibits were obtained from or through defendants during the consolidated pre-trial discovery proceedings. Many of the documents received from the defendant-petitioners were nearly illegible at the time of receipt. All exhibits obtained from defendants have been reproduced as received.* In order to assist the Court, we have retyped certain of these exhibits. In a few instances, it has been necessary to leave a blank for a particular word or phrase because we have been unable to determine exactly what was said in the original.

Joseph B. Friedman
James H. Mann
Lucas, Friedman & Mann
1028 Connecticut Ave., NW
Washington, DC 20036

Ephraim Jacobs
Douglas V. Rigler
Foley, Lardner, Hollabaugh & Jacobs
815 Connecticut Ave., NW
Washington, DC 20006

*[Notice by petitioners re: preparation of this portion of the Appendix—Photocopies of original documents submitted by respondents before the Court of Appeals were in large part illegible and respondents provided typewritten transcriptions. The text reprinted here is that of respondents' typewritten transcriptions. No attempt has been made to reproduce photocopies of the original documents.]

EXHIBIT 1

TEXT OF THE PHILIPPINE CENTRAL BANK ACT

FIRST CONGRESS OF THE REPUBLIC
OF THE PHILIPPINES
Third Session

[H. No. 1704.]
(REPUBLIC ACT NO. 265)

AN ACT ESTABLISHING THE CENTRAL BANK OF THE PHILIPPINES, DEFINING ITS POWERS IN THE ADMINISTRATION OF THE MONETARY AND BANKING SYSTEM, AMENDING THE PERTINENT PROVISIONS OF THE ADMINISTRATIVE CODE WITH RESPECT TO THE CURRENCY AND THE BUREAU OF BANKING, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

CHAPTER I.—ESTABLISHMENT AND ORGANIZATION OF THE CENTRAL BANK OF THE PHILIPPINES

ARTICLE I.—*Creation, Responsibilities and Corporate Powers of the Central Bank*

SECTION 1. *Creation of the Central Bank.*—There is hereby created a body corporate to be known as the Central Bank of the Philippines, which shall be governed by the provisions of this Act.

The capital of the Central Bank shall be TEN MILLION (₱10,000,000) PESOS, which are hereby appropriated from the assets of the Exchange Standard Fund, as provided in section 134 of this Act.

Exhibit 1

SEC. 2. *Responsibilities and objectives.*—It shall be the responsibility of the Central Bank of the Philippines to administer the monetary and banking system of the Republic.

It shall be the duty of the Central Bank to use the powers granted to it under this Act to achieve the following objectives:

(*a*) To maintain monetary stability in the Philippines;

(*b*) To preserve the international value of the peso and the convertibility of the peso into other freely convertible currencies; and

(*c*) To promote a rising level of production, employment and real income in the Philippines.

SEC. 3. *Place of business.*—The Central Bank shall have its principal place of business in the City of Manila, but may have such branches, agencies and correspondents in other places as are necessary for the proper conduct of its business.

SEC. 4. *Corporate powers.*—The Central Bank is hereby authorized to adopt, alter, and use a corporate seal which shall be judicially noticed; to make contracts; to lease or own real and personal property, and to sell or otherwise dispose of the same; to sue and be sued; and otherwise to do and perform any and all things that may be necessary or proper to carry out the purposes of this Act.

The Central Bank may acquire and hold such assets and incur such liabilities as result directly from operations authorized by the provisions of this Act, or as are essential to the proper conduct of such operations.

Exhibit 1

ARTICLE II.

THE MONETARY BOARD

SEC. 5. *Composition of the Monetary Board.*—The powers and functions of the Central Bank shall be exercised by a Monetary Board, which shall be composed of seven members, as follows:

(*a*) The Secretary of Finance, who shall preside at the meetings of the Monetary Board. Whenever the Secretary of Finance is unable to attend a meeting of the Board, the Undersecretary of Finance shall act as his alternate, but shall not preside.

(*b*) The Governor of the Central Bank, who shall preside at the meetings of the Board in the absence of the Secretary of Finance. The Governor shall be appointed for a term of six years by the President of the Philippines with the consent of the Commission on Appointments. Whenever, the Governor is unable to attend a meeting of the Board, the ranking deputy-governor shall act in his stead.

(*c*) The President of the Philippine National Bank, whose alternate shall be the senior vice-president of said bank.

(*d*) The Chairman of the Board of Governors of the Rehabilitation Finance Corporation, whose alternate shall be the ranking governor of said corporation.

---

1. This and succeeding references to the "ranking deputy-governor" are apparent errors, since the law provides for the appointment of only deputy-governor. *See* Sec. 31.

EXHIBIT 2

p. 1

RETYPED FOR LEGIBILITY PURPOSES

February 26, 1954

Tetracycline

FOREIGN PATENT APPLICATIONS

1. In the following "Convention" countries, a Pfizer patent should issue receiving benefit of at least Pfizer parent U.S. case (10/23/52). Cyanamid will also file under their convention date (2/16/53) and claim matter not covered by Pfizer case, provided this will not endanger the Pfizer broad claim.

Austria
Belgium (Pfizer-issued 2/15/54—Patent No. 523, 640) (Cyanamid issued 1/30/54)
Brasil*
Canada (Pfizer patent allowed) (Cyanamid filed—may also issue)
Cuba (Pfizer—restricted to parent case)
Egypt
France
Germany*
Great Britain (Parties cooperate to get broadest valid product claims)
Greece
Japan*
Mexico
Portugal
Spain (Issued 2/11/54)
Switzerland*
Turkey
Union of South Africa

* Cyanamid will file and claim their convention date (3/16/53) for all material not disclosed in Pfizer parent U.S. case, but will hold up prosecution to determine extent of protection received in Pfizer patent.

Exhibit 2

2. Countries in which Pfizer will file applications for confirmation patents based on Spanish patent or convert present applications to confirmation patents. Cyanamid may also file based on its Belgian case if discussions with foreign agents indicate that this has any value.

Argentina*
Belgian Congo (Both Pfizer and Cyanamid to file based on Belgian case)
Bolivia
Chile*
Colombia*
Iran
Iraq
Jamaica
Jordan
Peru*
Venezuela*

* Countries where pending regular Pfizer application is being converted to confirmation patent. We have been informed that this can be done without injury to the patent.

3. Convention countries in which Cyanamid will file and claim their U.S. filing date (3/16/53):

Australia*
Denmark*
Dominican Republic
Finland*
French Morocco
Holland
Indonesia**
Ireland
Israel
Italy*
Yugoslavia
Lebanon
Luxemburg
New Zealand*
Norway*
Philippines*
Sweden
Syria
Tangier
Trinidad
Tunisia

* Countries in which Pfizer applications were filed and will not receive benefit of U.S. patent case date but will be kept on file.

** Provisional filing will be made by Pfizer with attempt to claim U.S. date.

Exhibit 2

4. Following non-convention countries adhering to the Inter-Dominion Convention, Cyanamid will file based on its Canadian application date (9/12/53):

India*
Pakistan*

* (Consider withdrawing Pfizer application to give clearly valid Cyanamid patent).

5. Cyanamid will file in following countries claiming their U.S. application date (3/16/53) under Buenos Aires Convention:

Ecuador	Costa Rica
Haiti	Guatemala
Panama	Honduras
Paraguay	Nicaragua
Uruguay	

6. Pfizer will consider filing for registration patents in the following countries, based on our British patent (when it issues).

Aden	Kenya
Bermuda	Malay States
British Guiana	Nigeria
British Honduras	Nyasaland
Ceylon	Northern Rhodesia
Dominica	Singapore
Gold Coast	Tanganyika
Hong Kong	

Exhibit 2

7. Countries in which both Pfizer and Cyanamid *will* file:

Bahamas	Korea
Barbados	Salvador
Iceland	Southern Rhodesia
Liberia	Southwest Africa

8. Pfizer has filed and Cyanamid will also file:

Formosa (Taiwan)

EXHIBIT 3

CASE NO. 21,058—Continued

data obtained during the clinical trials is expected to be available. Also, it was noted at the Meeting, in view of the existence of a Scherico French patent which contains one broad claim that may be pertinent to this invention, a careful evaluation of this patent should be had prior to selecting countries for a recommendation for foreign filings on this case.

MAINTENANCE SECTION

The following patent cases are those in which the Pharmaceutical Chemicals Patent Committee has expressed no further interest and recommended abandonment of all corresponding patents and/or patent applications abroad. However, all of these patent cases fall within the terms of the licensing agreements with Bristol and/or Pfizer. Because of the Bristol-Pfizer aspects, Management has requested that all patents and/or patent applications concerned be maintained pending anticipated negotiations with Bristol and Pfizer on or after June 1, 1966 with a view towards obtaining Pfizer's and/or Bristol's concurrence in abandoning these items or, alternatively, give Bristol and/or Pfizer the opportunity to request continued maintenance of these patents and patent applications at their expense. These patent cases are as set forth immediately below:

Group "A"—GENERAL

CASE NO. 14,550

Albert Peter Doerschuk
Barbara Ann Bitlar
Milton Andrew Petty
—PRODUCTION OF ANTIBIOTIC II (BROMTETRACYCLINE)

Group "B"—TETRACYCLINE

Exhibit 3

CASE NO. 14,692

Harold Mendelsohn —PRODUCTION OF ANTIBIOTIC

and

CASE NO. 14,984

Albert Peter Doerschuk —FERMENTATION MEDIUM AND PROCESS OF MAKING AND USING SAME

EXHIBIT 4

B — TETRACYCLINE

CASE NO. 14,272

James H. Boothe
John Morton, II
—CHEMOTHERAPEUTIC MATERIALS AND METHODS OF PREPARING SAME

This invention is in use in the United States. It is licensed in a number of countries and also falls within the world-wide agreements with Bristol and Pfizer. The invention covers the catalytic reduction of chlortetracycline to tetracycline. Products produced by the invention are sold as ACHROMYCIN® Tetracycline Capsules. In view of the importance of the invention, it is recommended that all patents and patent applications abroad be maintained by payment of taxes and workings now due. However, this recommendation is made with the proviso that Mr. J. V. McDonald explore with Messrs J. V. Whittenburg and A. S. Phillips the possibility of eliminating from our maintenance program the patents in those countries where Pfizer has priority, and report to the Committee before June 1966, after which time we expect to write to Bristol and Pfizer seeking their concurrence in abandoning certain patent cases. The recommendation is also made with the proviso that any patents-of-addition be carefully noted prior to actually abandoning any patents corresponding to this invention.

Exhibit 4

CASE NO. 14,757

John H. E. J. Martin
Nestor Bohonos
Benjamin H. Duggar
Stanley E. DeVoe
—PRODUCTION OF ANTIBIOTIC (TETRACYCLINE BY FERMENTATION)

This invention is not in use in the United States. It falls within the terms of the Bristol agreements. This case represents a basic invention for producing tetracycline by fermentation whereby the so-called strain selection technique is used. In view of the importance of the invention it is recommended that all patents and patent applications abroad be maintained by payment of taxes and workings now due.

EXHIBIT 5

ONW/CMB

18th June, 1957.

Mr. R. T. Bogan,
Room 225,
U.S. Rubber Building,
New York 20, N. Y.

Dear Bob,

I just had Mr. Fenton of Pfizers on the phone enquiring concerning our export sales policy for antibiotics in Eastern European countries and China. I told him that we were following the policy of our parent company in that we were not shipping into these areas. Mr. Fenton volunteered the information that this was also his policy at the moment, with the exception that they were actively engaged in making sales to Poland.

Fenton also told me that Leslie Smith of Parke Davis had told him that he makes no bones concerning shipments not only into Eastern Europe but also into China. I thought this information might be of interest to you, if you are not already aware of it, and would be anxious to receive any changes in policy which will enable us to broaden our business in an approved manner.

Yours sincerely,

/s/ Pete

O. N. Williams

EXHIBIT 6

PFIZER

MEMORANDUM

Date: 30th March 1965
To: All Country Managers
From: L. E. Armerding—Nairobi
Subject: Oxytetracycline Infringements

CONFIDENTIAL

I have recently had occasion to correspond with our Legal Department in New York concerning these infringements in Africa.

While it continues to be company policy to defend ourselves wherever possible, we must realise that our patent position on oxytetracycline in Africa is very weak, and therefore there is little that can be done within the continent itself.

Furthermore, the logical place to exert pressure is the country in which the supplier of the original material is located, and it is interesting that these are precisely the countries (with the exception of Italy) where our patent position is most effective.

However, in order to help the Legal Department in New York to help us, the important thing is to determine the sources from which the company operating in your territory receives its material. This determination should be substantiated by conclusive evidence and can then be used

Exhibit 6

by the New York Legal Department to help us defend our patent position.

L. E. Armerding

/pmf

To: Messrs. A. J. Barbosa—Lourenco Marques
N. C. Goutard—Casablanca
T. H. Heinrichs—Accra
C. J. Jones—Ikeja
T. H. Lloyd—Nairobi
M. F. Marques—Luanda
G. E. Norman—Salisbury
R. S. Parott—Johannesburg
B. Vignes—Dakar

c.c. Mr. J. W. Dougherty—New York

EXHIBIT 7

RETYPED FOR LEGIBILITY PURPOSES

EXECUTIVE STAFF MEMORANDUM
BRISTOL-MYERS AND SUBSIDIARY COMPANIES

DATE September 25, 1957
SUBJECT Banyu Tetracycline

W. F. Moos
A. J. Vermeulen

Messrs. B. B. Clyman
D. L. Sanders

CONFIDENTIAL

Today Austin Phillips telephoned to ask whether we had extended Banyu's tetracycline Territory beyond Japan and had inadvertently failed to notify them of such fact. He explained the reason for his inquiry as being a cable from Takeda to the effect that Banyu had listed tetracycline as a product available for export from Japan in an exporter's catalog soon to be published. This is the Catalog of Pharmaceutical, Medical and Dental Supplies of the Exporters Association which is to be published early in 1958. Phillips is concerned because if one Japanese manufacturer is permitted by his licensor to export, pressure from the government on the other Japanese manufacturers to do likewise will be tremendous.

I informed Phillips that we had not extended Banyu's Territory, and I relayed your opinion that Banyu would not deliberately go outside of its Territory and your strong aversion to disrupting our good relationship with Banyu

Exhibit 7

by even querying them in this matter. Phillips found our attitude completely understandable and said that he would endeavor to obtain more definite information and possibly proof of Takeda's belief which he will forward to us as soon as it is received.

I know that there was no change in the written documents, but you will remember considerable discussion about China and that in the proposed amendment prepared to authorize Banyu to sublicense Meiji if that deal went through. Banyu's Territory [has] changed to include China. The proposed amendment was never executed and Banyu's Territory was not changed in writing, but Banyu seems quite satisfied to operate on oral statements, and I am wondering whether that [c]ould possibly be happening here.

WFM: RBB

EXHIBIT 8

MEMORANDUM

BRISTOL LABORATORIES

FROM C. W. Carlson
To File
C.C.

DATE March 2, 1966

SUBJECT Canadian and Philippine Tetracycline Infringement

On March 2, 1966, Mr. Sterns brought to our attention the fact that he had just received from Mr. Enriquez samples of Unitrex capsules, reportedly tetracycline hydrochloride. This product is distributed in the Philippines and by its label indicates that it originates with Lukas Pharmaceuticals of Toronto, Canada.

In view of the patent situation in the Philippines, it would be desirable to try to police this infringement from Canada.

/s/ C. W. C.
C. W. C.

EXHIBIT 9

Deposition of Frank Wilson, Vol. II

[86] Q. Did you ever attend meetings of that organization when it was discussing or concerned with the problem of generic drugs in competition with branded products in various portions, parts of the world?

A. No.

Q. Mr. Wilson, during the time that you had been employed by Pfizer International, can you tell me whether or not you have met with, contracted or discussed with any personnel employed by any of your competitors any matter relating to the business of your company or the competitor's company?

A. Yes.

Q. All right. Would you tell me just generally, sir, the circumstances under which you have had such meetings or contacts with representatives of competitors?

A. In the early days of establishing our International organization we did contact major competitors and asked them specific questions regarding specific actions in specific markets.

Mr. Boyden: Incidentally, when you are using the word "company" in this question, Mr. Greenan, are we going back to Pfizer International? As you stated yesterday, you were using the Pfizer International.

Mr. Greenan: Right. I think, as a matter of fact, this question was specific on Pfizer International as I worded it.

[87] Mr. Boyden: Fine.

Exhibit 9

By Mr. Greenan:

Q. You speak of the early days, sir. During what period of time, to your knowledge, were contacts made of major competitors to ask them specific questions on specific subjects?

A. I would say up through late '59 or early—or in 1960.

Q. Can you tell me, sir, the circumstances surrounding these contacts, that is whether or not these were written or by phone or by direct reading, that sort of thing?

A. Generally by telephone.

Q. When you say that you would contact representatives of your major competitors, sir, I wonder if you could identify for me, to the best of your recollection, the major competitors whom you have contacted as you described?

A. I would say Cyanamid, Squibb. To a lesser extent, Bristol.

Q. And have you ever had any contacts, that you recall, sir, with any representative of the Upjohn Company?

A. I cannot recall any.

Q. Beginning first with the Cyanamid Company, Mr. Wilson, would you give me the names of the individual at that company that you recall having contacted with specific questions on specific subjects?

[88] A. Ralph Roland. Ernie Hesse. A fellow named Bliss, but I can't recall his first name.

Q. Bliss?

A. Bliss. I think it was—

Q. B-l-i-s-s?

A. I think it's—I don't know if it's Ray Bliss or—I have forgotten his first name. That's about all I think. I can't recall any others.

Exhibit 9

Q. Do you recall a gentlemen by the name of Porro?

A. No.

Q. P-o-r-r-o, Juan Porro?

A. No.

Q. Do you recall a gentleman by the name of Bert Tamblin?

A. Yes, Bert Tamblin, that's the name. I am sorry, I forgot that one.

Q. Now could you identify for me, sir, Ralph Roland? That is, to the best of your knowledge, what was his position in the American Cyanamid organization?

A. I really don't know. His was in the International, and I think originally his name was given to me by someone in our own organization. Possibly Preston McGoodwin, who previously worked for Cyanamid.

Q. Under what circumstances, sir, did you contact Mr. Roland?

[89] Mr. Boyden: What do you mean by that Mr. Greenan? Do you mean what did he call him about or contact him about?

Mr. Greenan: Strike the question.

By Mr. Greenan:

Q. Did you contact Mr. Roland, as you have described, sir, to ask him specific questions on specific subjects?

A. Yes.

Q. I wonder if you could explain for me the incidents when that occurred?

A. Whenever we received an inquiry or report from the field which indicated that Cyanamid had been reported to have taken some action which we had no record of information of occurring elsewhere.

Exhibit 9

Q. When you say "taken some action," sir, would that include a change in prices?

A. Possibly.

Q. Would that include things such as the offer of free goods on a government tender?

A. Possibly.

Q. When you had received such an inquiry or report, sir, what would be the purpose for contacting Mr. Roland?

A. Well, our problem was that we didn't have in the early days enough information about the market, and from experience found out that many hospital purchasing agents or municipal buyers deliberately mislead our personnel as to the • • • [102] discuss anything pertaining to the business of Pfizer or its competitor?

A. No.

Q. When did you first begin contacting any representative of the Cyanamid organization on these matters which we have discussed?

A. I honestly can't recall.

Q. Is there any way you are able to tie it down with regard to a particular period of time?

A. I would say it was prior to some time in late '59 or '60.

Q. Prior to late '59 or early '60?

A. Yes.

Q. Do you recall how much prior?

A. It would be measured in years, but I honestly can't say how long.

Q. Do you recall the circumstances under which you first contacted a representative of the Cyanamid organization?

A. I think the question was raised in our organization as to what we could do about information that was being supplied by our field organizations in which we did not have

Exhibit 9

full faith and reliability in. And our legal counsel, Paul McDermott, indicated to us that we could contact competitors if we limited our inquiries to specific markets, products and • • • [106] other individuals within Pfizer International of whom you were aware were having contacts with representatives of competitive organizations, such as those which you have described?

A. Possibly someone under John Smart.

Q. Can you tell me, sir, whom that individual might have been?

A. No, I do not recall the individuals. At one time this was a training spot, and we did have a fair turnover.

Q. Other then someone who reported to Mr. Smart, any other individuals in the Pfizer Organization?

A. Not that I can recall.

Q. Would you tell me, Mr. Wilson, whether or not from time to time representatives of the American Cyanamid Company contacted you with regard to matters pertaining to the business of either American Cyanamid Company or it competitors?

A. They may have, but I think most of that contact would be with John Smart.

Q. Do you recall ever receiving an inquiry from any representative of American Cyanamid Company on any matter pertaining to Pfizer's business?

A. It's possible, but I can't recall.

Q. All right. Do you recall whether or not Mr. Smart ever reported to you that he had received inquiries from representatives of the American Cyanamid Company requesting [107] confirmation or denial of certain matters?

A. I think so.

Exhibit 9

Q. Do you recall whether or not Mr. Smart ever reported to you that he had confirmed or denied an inquiry from a representative of the American Cyanamid Company?

A. I also think so.

Q. All right. Now, Mr. Wilson, with regard to all of these discussions we have had with regard to your contacts with representatives of American Cyanamid Company, would you tell me whether or not these contacts pertain to the broad spectrum antibiotic products?

A. With Cyanamid?

Q. Yes.

A. I would think most of them were broad spectrum. There may have been some on steroids also.

Q. But the majority of them would have been on broad spectrum antibiotic products?

A. Right.

(Discussion off the record.)

By Mr. Greenan:

Q. Mr Wilson, would you tell me whether or not you ever had any written communications with any representative of the American Cyanamid Company on any matter pertaining to the business of Pfizer?

A. I don't think so.

• • •

[120] A. I just wanted to make that clear.

Q. —you had any contacts with any individual—

A. Okay.

Q. —pertaining to business of your companies.

A. The answer to that is no.

Q. Would you tell me, Mr. Wilson, whether or not you were aware that any other individual connected with the

Pfizer Organization contacted personnel at the Squibb Company on matters pertaining to either Pfizer's business or that of its competitors?

A. The pricing department.

Q. When you say "the pricing department," would that be Mr. John Wilson—I mean John Smart?

A. It would be John Smart or someone working for him.

Q. Or someone that reported to him? Do you recall any specific instances of such contacts reported to you?

A. No, I don't recall any.

Q. Do you recall any specific individuals whom Mr. Smart or any other person in the pricing department mentioned that they were contacting at Squibb?

A. No.

Q. Do you recall what types of contacts Mr. Smart or the pricing department were making with Squibb?

A. Similar to the ones I was making.

Q. Can you tell me, Mr. Wilson, whether or not you were [121] ever contacted by any individual of the Squibb Company on any matter relating to the business of Pfizer or its competitors?

A. I would say yes.

Q. All right. Tell me, sir, who would have contacted you from the Squibb Company?

A. The same people that I was contacting.

Q. All right. And what types of contacts would these have been, sir?

A. Generally of the same nature.

Q. Telephone communications?

A. Yes.

Q. And the subject matter generally was price confirmation or free goods confirmation, that sort of thing?

A. Right.

Q. Is that correct?

A. Yes.

Q. Would you tell me, Mr. Wilson, whether or not it was ever reported to you that other members of the Pfizer Pricing Department had been contacted by Squibb personnel on matters relating to Pfizer's business or that of its competitors?

A. I can't recall specifically, but no doubt it was true.

Q. You have no specific recollection of that?

[122] A. No.

Q. In all of these questions pertaining to contacts with the Squibb organization, Mr. Wilson, were these on matters related to broad spectrum antibiotic products?

Mr. Boyden: You mean exclusively?

The Witness: No.

By Mr. Greenan:

Q. Were some of them on matters relating to broad spectrum antibiotic products?

A. Yes.

Q. Do you have any way of telling me what percentage of the inquiries to which you have referred related to broad spectrum antibiotic products?

A. I would say more than half.

Q. More than half. Did you ever have any contacts with Mr. Herb Wolfe at Squibb?

A. Yes.

Q. What types of contacts did you have with that gentleman?

A. Completely unrelated to the contacts with the other type of individuals. He handled sales to U.S. export trade, which was the department that also reported to me. Still

Exhibit 9

does. And interpretation of ICA, and eventually AID regulations was a common source of confusion in the industry, and I think most of my contact was in this area.

[123] Q. When you say "sales to U. S. export trade," Mr. Wilson, I wonder if you could be a little more specific on that? What did you mean by that?

A. Well, we have sales in International which are handled through a separate department in New York, and it was two broad major groups. One group is companies representatives and brokers who are domiciled in the United States and have special arrangements with firms overseas. This could be oil companies, United Fruit, it could be a New York representative of a larger firm overseas who insisted on dealing or purchasing—make that purchasing—through their New York representative. The second part of this group was sales that we made on a direct basis from New York to markets overseas where we did not have the equivalent local representation. This generally was for chemicals, agricultural products, specialized items and also for small markets where Pfizer had very little representation.

Q. All of these sales were subject to U. S. Export Regulations, and quite a number of them were financed by U. S. grants or loans made to foreign governments. This in turn required certification by the U. S. company or the exporter, as to the validity of the rules, competitiveness of the price and whether or not we had or were getting lower prices or special concessions to other classes of trade. This required quite a bit of legal interpretation and the maintenance of

• • •

[141] A. If he did, I don't recall it.

Exhibit 9

Q. I see. Now, sir, you also mentioned this morning that you had some discussion with personnel of the Bristol organization.

A. That's right.

Q. I wonder if you could identify for me, sir, the individuals connected with the Bristol organization with whom you had these contacts?

A. I cannot recall the individual. It was very limited, because Bristol was not a significant factor in the International markets, and we were only interested in the major competitors in the market, and this regarded activities of the lesser competitors.

Q. Do you recall whether or not the contacts—well, those contacts which were made with the Bristol organization were what type of contacts, Mr. Wilson?

A. Similar to that with the others, but for a limited number of markets where Bristol was a factor.

Q. Do you recall whether or not these were telephonic contacts?

A. Yes. All telephonic.

Q. And were these contacts for the purpose of verifying information or reports that you had received from the field concerning Bristol activity?

A. That's correct.

EXHIBIT 10

Deposition of Edmond T. Pratt, Jr.

[94] to maintain the patent. And so I recall generally that subject coming up from time to time, but I don't remember any specifics about it.

Q. Do you recall any occasion in or about 1966 or '67 or '68 in which Pfizer management exchanged views with Cyanamid management with respect to which patent should be maintained in certain foreign markets?

A. No, I really don't.

Q. You didn't participate in any such discussions?

A. No, I don't recall any such discussions.

Q. Do you recall participating in any such discussions relating to broad spectrum patent maintenance between Pfizer and Bristol?

A. No.

Q. In how many countries today does Pfizer have pending legal action relating to broad spectrum antibiotic patents, to the best of your recollection?

A. I wouldn't know a number. I would say it's a significant number.

(The following proceedings were had on the confidential record.)

• • •

[97] By Mr. Rigler:

Q. With respect to the significant number of pending legal actions relating to broad spectrum antibiotics, would this include actions relating to oxytetracycline, tetracycline and doxycycline?

A. Yes.

Q. There is no area in which you have given up then?

A. I don't think so. I think we still have—it is my recollection that we still have some pending actions in all three.

Exhibit 10

Mr. Rigler: I have no further questions.

Mr. von Kalonowski: We have none, so I take it the deposition is adjourned.

Mr. Rigler: Yes.

Mr. von Kalonowski: Concluded.

Mr. Rigler: I suppose it comes into the thirty-day rule in case any of the other plaintiffs counsel feel that I have neglected their interest.

Mr. von Kalonowski: Whatever the thirty-day rule says, it says, and I won't speculate on it.

Mr. Rigler: At any rate, I don't intend to ask Mr. Pratt anymore questions.

(Whereupon the deposition was concluded.)

• • •

EXHIBIT 11

MEMORANDUM

BRISTOL

From: E. E. Enriquez DATE August 24, 1964
To: W. J. Hemphill SUBJECT Competition—TETREX

Separately, we are sending you a bottle containing 100 capsules of TETRACAPS (tetracycline HCL) 250 mg. The label indicating the contents were supplied by Lucas Pharmaceutical of Toronto, Canada. We understand it is locally distributed by TRO Enterprises. TRO stands for Teofilo R. Ongkingko, a former PD detailman. It appears Mr. Lucas is also a former PD executive who now operates his own company.

Vic Montenegro, Sales Manager of PD, informs me that they have sued Lucas Pharmaceutical for distributing Chloro-Syrup in the Philippines and they have won their suit. However, TRO, after promising not to distribute Chloro-Syrup anymore, keeps on distributing more of the same.

TETRACAPS is carried by 2 big wholesalers in Manila, Commander Drug and Salud Drug, who sell the bottle of 100s at ₱30.00 each.

TRO's 3 detailmen sell direct to dispensing physicians at ₱35.00 per bottle and the physician sells to the patient at ₱0.45 to ₱0.50 per capsule.

We received a note from Sherm transmitting an inquiry from Dr. Julio Alzona of Lucena City, Philippines, regarding the availability of 5,000 pes. of Tetrex Capsules. Our Southern Tagalog representative vised Dr. Alzona to stock him with Tetrex. However, Dr. Alzona had some 40 bottles of TETRACAPS 100s. He is not buying Tetrex as long as he has TETRACAPS in stock and, according to him, the price of TETRACAPS is low enough to offset any

Exhibit 11

clinical advantage tetracycline complex phosphate may have over tetracycine HCL.

Our representative visted 10 dispensing physicians in the general area and they were all heavily stocked with TETRACAPS.

It appears that our only market for Tetrex in the Southern Tagalog area will be with the prescribing doctors. Neither can we sell Tetrex Syrup to dispensing physicians as Lucas detailmen are supplying these physicians with Chloro-Syrup at ₱60.00 per 40 oz. bottle, or ₱3.00 per 2 oz. bottle; we retail TPC at ₱7.60. Other areas have not reported of the presence of TETRACAPS in their market.

Please refer to my memo of April 20th re: Competition informing you of the impending entry into the market of Unimycin (tetracycline HCL) to be distributed by Unitex Laboratories. Jim Penrose, local Manager of Upjohn, called me up one day and I informed him that I saw stacks and stacks of Unimycin cartons in our printer's warehouse.

I understand that Jim Penrose called up Pfizer's General Manager, Herb Duncan to appraise the latter of Unimycin's impending entry into the market. I was later informed that Herb talked with United Laboratories and prevailed on the latter to desist from selling Unimycin in the Philippine market.

This morning, I called up Jim Penrose and gave him the news on TETRACAPS with the unveiled hint that Herb will probably be interested in going after Lucas Pharmaceutical. Jim, who learned about TETRACAPS only now, promised he will inform Herb Duncan.

We hope Pfizer will pick up our chestnut from the fire—afterall, they hold the Philippine patent on tetracycline hydrochloride.

E. E. ENRIQUEZ

EEE: tc

EXHIBIT 12

MEMORANDUM

BRISTOL LABORATORIES INTERNATIONAL CORPORATION

FROM S. H. Stearns — DATE January 17, 1968

To W. J. Hemphill — SUBJECT Bulk Prices—Philippines

C.C. T. E. Abrams
B. A. Barth
BLISA
D. M. Higgins
E. J. LeMoal
F. W. Teltscher
R. S. Wolff

The Price Committee has reviewed the contents of E. E. Enriquez' memorandum to you of January 10 concerning the prices for bulk TC and has approved of the following prices as requested by him:

List No.	Description	FOB Panama
41890	Tetracycline HC1	US$ 127.00/kgW
43210	Tetracycline Phosphate Complex	127.00/kgW

We would like to repeat, however, that we trust that B. L. Philippines will have no difficulties with Customs when importing at this higher price as mentioned in our memorandum to you of December 4, 1967.

Best regards,

S. H. Stearns

SHS/sl

EXHIBIT 13

RETYPED FOR LEGIBILITY PURPOSES

MEMORANDUM

No.: 250- -NY — July 7, 1959

To: Pricing Division—New York

FROM: Mr. L. E. Armerding O Manila

SUBJECT: Prices

As you know, Squibb agreed sometime ago to cease selling Mysteclin V capsules in bottles of 500 except to a very limited number of hospitals. Although this was not a satisfactory arrangement, we felt that it was a decided improvement on their previous policies and we were willing to tolerate this situation during a reasonable period of readjustment.

However, it has come to our attention that Squibb is not fulfilling their promise in this respect and we feel that, under the circumstances, we are justified in instituting sales of our broad spectrum capsules at prices competitive with theirs. Therefore, unless we receive your express instructions to the contrary, we propose to offer multiple packs of our broad spectrums 250 mg capsules, 5 bottles of 100, at the same prices as Squibb is selling them to an equivalent number of hospitals beginning July 16. According to information received from the local Squibb manager, this includes 16 hospitals in the Manila area and 104 hospitals in the provinces.

[This] is in no sense to be construed as a price cut and in view of the fact that Squibb has been consistently under-

Exhibit 13

selling us for a good many months, we feel that there can be no valid objection to our meeting their prices in those areas where they are already offering these cut prices to their customers. Although we expect to offer it only to hospitals, we have reliable information from 4 different retailmen on our staff that Squibb is also making these sales to leading wholesalers, as well as to the principal hospitals. Furthermore, it seems unreasonable for them to claim that these are just the leading hospitals since statistics indicate that there are only about 300 hospitals in the Philippines altogether which would indicate that they are giving those prices to approximately ⅓ of all hospital customers.

L. E. Armerding

cc: BAHQ Hongkong
Reading
Chrono
Subject

EXHIBIT 14

Retyped for Legibility Purposes

MEMORANDUM

July 23, 1959

To: New York Pricing Division

From: Mr. L. E. Armerding—Manila

Subject: Price Situation

We have good news with respect to the bottles of 500 Mysteclin V. Squibb has finally agreed to limit their sale to just 13 hospitals in Manila, none in the provinces, and no commercial or industrial customers anywhere. This represents only about 10% of the customers served with this size in the past. In view of this favorable trend, we will not introduce the 500's ourselves since we desperately want to keep our prices as high as possible.

On the other hand, it is apparent that United and Lepetit are not being as cooperative as we had hoped. We know that Lederle has threatened to sue United for patent infringement and, as is typical of the Chinese, it may be that they are liquidating stocks prior to withdrawing from the market as they did when Hoechst threatened them with a suit on their Teralin. In any case, they are selling bottles of capsules to some customers as low as less 20% (list is P. 5.25) and there are outlets selling **to the at per capsule. There is a flood of** sample material circulating commercially as low as P 40.00 per 100 to the wholesaler. This is on sale to drugstores at P 60.00 per hundred.

Exhibit 14

It would be helpful if you could tell us how much Lepetit agreed to bill United on bulk tetracycline and also any idea as to how much they had actually shipped them. Can you get this information for us?

In general, the price situation is very confused. Just this morning we heard that the present administration plans to allow prices to rise about as much as would occur under devaluation, then clamp down hard on prices and devalue the peso. This scheme has merit and would not be at all surprising. In this case, it would be to our advantage to take every possible step to raise rather than lower our prices, and we will be exploring this angle carefully over the next few days.

L. E. ARMERDING

cc: Hongkong

EXHIBIT 15

[Letterhead of Kirkland, Ellis, Hodson, Chaffetz & Masters]

April 22, 1971

Honorable Miles W. Lord
Judge, United States District Court
District of Minnesota
Federal Courthouse
4th and Marquette
Minneapolis, Minnesota 55401

Re: *Republic of Vietnam* v. *Pfizer, et al.*
and *State of Kuwait* v. *Pfizer, et al.*

Dear Judge Lord:

On behalf of defendants, I would like to respond briefly to Mr. Paul Owens' letter to you of April 18 referring to the United States Government's amicus position in the Kuwait and Vietnam cases that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act.

While it may be correct that the Republic of India was a named plaintiff in several electrical equipment treble damage cases, it certainly is not clear that the issue of the Republic's own standing to sue was presented to the Court in Philadelphia in 1963 or that the judges there decided that issue. It definitely cannot be said, on the basis of the transcript and order provided by Mr. Owens or on the basis of any information we have, that "the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented" and that denial of defendants' motions there "necessarily involved a holding" that foreign governments are "persons," as Mr. Owens argues.

Exhibit 15

Counsel for both sides in those cases, and indeed Judge Joseph Lord himself, all stated the issue as involving the standing of a government corporation organized under Indian law. (Tr. 143-45, 155, 157). Moreover, the Order of June 21, 1963 is not explicit.

On that record, defendants urge that this Court cannot find precedential support for the position of Kuwait and Vietnam. It seems to us that a decision as important as this—whether foreign governments may maintain treble damage actions—and with such far-reaching implications must be based on firmer ground. The Antitrust Division more appropriately should address its argument to the Congress. Thus we renew our request that defendants' motions to dismiss these two cases be granted for the reasons stated in our briefs and oral argument.

If the Court is not so inclined, defendants are prepared to resume argument, at the Court's convenience, on the remoteness questions presented in their motion to dismiss the Vietnam case.

Yours very respectfully,

JOHN H. MORRISON

JHM: gb
cc: John T. McDermott, Esq.
Perry Goldberg, Esq.
Robert W. Thabit, Esq.
Counsel for all defendants
Paul A. Owens, Esq.

EXHIBIT 16

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

RWMcL:LB:PAO
60-21-139

April 18, 1971

Honorable Miles W. Lord
United States District Court
Minneapolis, Minnesota 55401

Re: *The Republic of Viet-Nam* v. *Chas. Pfizer, et al.* (70 Civ. 877) and *The State of Kuwait, et al.* v. *Chas. Pfizer, et al.* (69 Civ. 4091)—S.D.N.Y.

Dear Judge Lord:

On March 16, 1971 the United States filed a brief as *amicus curiae* in the above captioned cases in support of the position that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act entitled to maintain treble damage actions.

During the course of my oral argument on this issue at the hearing on March 16, 1971, the question arose (Tr. pp. 205-8) as to whether the courts have ever previously ruled upon this question and, more specifically, whether in the electrical equipment cases the Government of India had been held to be a person entitled to maintain a treble damage action for damages sustained on its purchases of electrical equipment. I advised the court that I had been informed that the standing of the Government of India and certain of its instrumentalities to maintain such suits had been upheld in an unreported decision (Tr. 204-206). This representation was challenged by Mr. Morrison who presented the oral argument on behalf of the defendants.

I have made a further inquiry into this subject and have learned that there were some nine treble damage actions filed in the Eastern District of Pennsylvania based on purchases of electrical equipment.* The plaintiffs in various of these actions were the Government of India, the Damodar Valley Corporation (a wholly owned Government corporation similar to our TVA created by act of the Indian Parliament), and certain government owned public utilities of the States of India such as the Mysore State Electricity Board, the Rajasthan Madras State Electricity Board and the Punjab State Electricity Board. The court records disclose that the Republic of India itself, as distinguished from its instrumentalities, was a named plaintiff in at least five of these actions, *viz.*, Civil Action No. 30965, 30967, 30971, 30973 and 30974.

Motions to dismiss certain of these actions were filed on the ground that the Indian Government and its various intrumentalities were not persons entitled to maintain treble damage actions. The issue was argued before Chief Judge Thomas J. Clary and Judge Joseph S. Lord, III, on June 18, 1963. I have obtained and am enclosing a copy of the transcript of the oral argument held on this issue.

I think it is clear from the transcript that the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented.

On June 21, 1963 Chief Judge Clary and Judge Lord entered an order denying the defendants' motion to dismiss the complaints on this and other grounds. The denial of

* The reason for the fact that there were nine different cases appears to be that the complaints sought to track the several criminal indictments, each of which was directed at a price fixing conspiracy affecting different kinds of electrical equipment such as turbine generators, power capacitors, industrial control equipment, etc.

these motions to dismiss necessarily involved a holding that the Republic of India and its instrumentalities were persons within the meaning of Section 4 of the Clayton Act entitled to maintain a treble damage action. Set out below is the text of the court's order entered in Civil Actions 30965-974 as it appears in the court records.

> And now, to wit, this 21st day of June 1963, upon consideration of the various motions of defendants to strike the allegations from the complaints in the above captioned actions, to dismiss some of the complaints in the above captioned actions, and for more definite statements in some of the above captioned actions,
> It is hereby ordered and decreed that all of the defendants' motions to strike, to dismiss and for more definite statements directed to the above captioned complaints are hereby denied. Defendants shall have thirty (30) days from the entry of this order to answer the complaints, except that the anwers to Civil Action No. 30974 may be deferred pending amendment by plaintiffs to allege which count or counts the purchases belong.
>
> /s/ Thomas J. Clary, C.J.
> /s/ Joseph S. Lord, III

Since the text of the statute makes it undisputably clear that foreign corporations have a right to maintain treble damage actions, I argued that it would frustrate the clearly evident Congressional intent to deny a foreign government the right to maintain an action for damages on the purely technical ground that it made its purchases directly in its own name and not through a wholly owned government corporation.

Exhibit 16

The Congressional purpose to enhance the effectiveness of the antitrust laws by authorizing private treble damage actions to supplement federal government enforcement efforts must be given judicial effect if it is clearly discernible behind the specific manifestation in the text of the statute. This is precisely what was done in *Georgia* v. *Evans*, 312 U.S. 159 (1942) where the Supreme Court recognized the right of the state to maintain a treble damage action even though states were not specifically enumerated in the definition of "person" as set out in the statute.

Similarly, the Congressional purpose should be effectuated by recognizing the standing of foreign governments to maintain treble damage actions. Where the basic policy of the statute is so plain it would be a misfortune if a narrow or grudging process of construction were to confine the effect of the statute to the particular cases to which Congress adverted so as to thwart the Congressional purpose and to discriminate against injured parties whose equity is indistinguishable.

Sincerely yours,

RICHARD W. MCLAREN
Assistant Attorney General
Antitrust Division

By: /s/ PAUL A. OWENS
Paul A. Owens
Attorney, Department of Justice

Enclosure

cc.: All defense counsel of record
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Counsel for the State of Kuwait
John McDermott, Esq.
Judicial Panel on Multidistrict Litigation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY,

Petitioners,

v.

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF VIETNAM, AND THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota are contained in the Appendices to the Petition.

JURISDICTION

The jurisdictional requisites are set forth adequately in the Petition.

QUESTION PRESENTED

Whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970)?

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clayton Act (Act of October 15, 1914, ch. 323, 38 Stat. 730, as amended) are set forth in the Petition, pp. 2-3.

STATEMENT OF THE CASE

The chronology of events contained in petitioners' statement of the case is essentially correct. Certain procedural background material underlying petitioners' belated resort to interlocutory appellate review was omitted.

The question of a foreign government's standing to maintain suit first was raised in the Consolidated Broad Spectrum Antibiotics Actions in 1969, when the State of Kuwait filed a damage action in the United States District Court for the Southern District of New York. In 1970, the Republic of Vietnam[1] filed a similar suit, and in 1971 petitioners moved to dismiss the *Kuwait* action on the ground that a foreign government is not a "person" within the meaning of Section 4 of the Clayton Act. Following briefing and argument, in which the United States participated as *amicus curiae* in support of the foreign governments' position, the district court entered an order denying the motions to dismiss. *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971). That order was certified pursuant to 28 U.S.C. §1292(b) (1970) to the United States Court of Appeals for the Second Circuit which accepted petitioners' appeal.[2] *Appeal Docketed*, No. 71-1754 (2d Cir. 1971).

[1] The Vietnam action has been dismissed by the district court. *The Republic of Vietnam v. Pfizer, et al.*, No. 4-71 Civ. 402 (D. Minn., Dec. 2, 1976) (order dismissing action). *Appeal Noticed*, Dec. 23, 1976 (8th Cir.).

Prior to the completion of the briefing schedule, however, petitioners requested the Second Circuit to dismiss their appeal, apparently as a result of an agreement with the plaintiff by which Kuwait dismissed its action on a non-prejudicial basis. At the time petitioners moved to dismiss the appeal, the "person" issue was not mooted because the District Court's *Kuwait* decision specifically had made that ruling applicable to Vietnam. *In Re Antibiotic Antitrust Actions, supra*, 333 F. Supp. at 315, N.1.

In April, 1972, the Republic of the Philippines brought suit and petitioners again raised the affirmative defense that a foreign government lacked standing to maintain suit. The Philippines filed a motion to strike the affirmative defense and on January 16, 1974 the District Court for Minnesota again ruled that foreign governments are "persons" with standing to sue. Misc. Order No. 74-31, Petition App. C. Defendants declined the invitation of the Philippines to seek immediate certification pursuant to 28 U.S.C. §1292(b) notwithstanding the District Court's announced

[2] In 1970, the non-settling broad spectrum antibiotics actions were consolidated pursuant to 28 U.S.C. §1407 (1970) for coordinated pretrial proceedings in the Southern District of New York. *In re Antibiotic Drugs*, 320 F. Supp. 586 (Jud. Pan. Mult. Lit. 1970). These cases subsequently were transferred to the District of Minnesota pursuant to 28 U.S.C. §1404(a) (1970) and the United States Court of Appeals for the Eighth Circuit assumed jurisdiction of interlocutory appeals from the District Court. See *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971).

willingness to certify the issue upon petitioners' request. Transcript of Pretrial Conference, November 1, 1972 at 80-82, Appendix A. Petitioners resisted the opportunity to have the issue certified until June 1974.[3]

REASONS FOR DENYING THE WRIT

I.

THE ISSUE RAISED BY PETITIONERS WAS DECIDED CORRECTLY BY THE CIRCUIT COURT OF APPEALS. IT RAISES NO CONSTITUTIONAL QUESTION NOR DOES IT INVOLVE ANY CONFLICT BETWEEN CIRCUITS. THE ISSUE DOES NOT MERIT IMMEDIATE CONSIDERATION BY THIS COURT.

Petitioners assert that these actions, involving a question of statutory interpretation, pose an important and heretofore undecided question of federal law which this Court must settle without delay. There is nothing to suggest that immediate review of the Eighth Circuit's decision is necessary or appropriate or that that decision was incorrect. The Eighth Circuit opinion was consistent with the prior precedents of this Court and accurately reflected the intent of Congress in enacting Section 4 of the Clayton Act.

[3] The District Court then declined to certify the issue, and petitioners sought to obtain a writ of mandamus in the United States Court of Appeals for the Eighth Circuit directing certification. The Eighth Circuit denied the petition. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). When the Government of India filed suit on October 11, 1974, the District Court agreed to certify the issue not only as to India but as to other governments which would be affected by the outcome. These included Iran, the Philippines and the Republic of Vietnam. It is this interlocutory appeal which is the subject of the instant petition.

A. The Question of Foreign Government Standing Under Section 4 of the Clayton Act Has Been Reviewed Comprehensively by Two Lower Courts Which Correctly Decided the Issue.

The question of a foreign government's standing to maintain an action for damages in its proprietary capacity under Section 4 of the Clayton Act has been the subject of careful and lengthy consideration by both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Minnesota. The District Court found that these foreign sovereigns were "persons" within the meaning of Section 4; the Court of Appeals panel unanimously affirmed that judgment; and finally the Eighth Circuit sitting *en banc* endorsed the decision of the original panel. There has been no conflict in the decisions of the lower courts in these actions, nor has there been a conflict with the decision of any other federal court. Moreover, the Executive Branch throughout this litigation has supported the standing of foreign governments to seek redress for antitrust violations[4]; the Department of Justice appeared *amicus curiae* in both the District Court and, after due consultation with the Department of State, in the Court of Appeals. In short, petitioners ask this Court to "settle" without delay a question as to which there has been no disagreement in the Judicial or Executive Branches of the government.

[4] In its consideration of government entities as "persons" within the meaning of the Clayton Act, the Court, in *United States v. Cooper Corp.*, 312 U.S. 600, 605 (1941), set forth a series of criteria to assist it in the evaluation of the Congressional intent. Among these considerations were the purpose, subject matter, context, legislative history and the "executive interpretation of the statute." Plainly, this important criterion has been satisfied. The assertion of the Attorney General that denial of remedy to foreign nations would undermine the fundamental purpose of the Clayton Act is entitled to great weight.

Petitioners cannot contend that the Court below failed to consider properly the controlling precedents of this Court or so departed from the accepted course of judicial proceedings as to compel the Court to exercise its "supervisory jurisdiction." Petition, p. 8; Sup. Ct. R. 19(1)(b). In reality, petitioners' only complaint is that they disagree with a result arrived at after much deliberation and careful thought.

B. Petitioners Are Incorrect in Their Assertion That Congress Did Not Intend to Include Foreign Governments Within the Meaning of "Person" for Purposes of Section 4.

Petitioners have asserted incorrectly, Petition, p. 8, that the Eighth Circuit made no finding of a Congressional intent to include foreign governments as persons. Not only was such finding made,[5] but it is supported by reference to the underlying purpose of the statute and by the repeated expression of interest by the Congress in protecting the foreign commerce of the United States including commerce with foreign nations.[6]

---

[5] The Eighth Circuit held:

> In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, *we conclude that Congress intended other bodies politic, such as a foreign government,* to enjoy the same right. There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper,* no other provisions of the Act support the contention that Congress intended to exclude foreign nations.

Petition App. B-7 (emphasis added).

[6] As noted by the Eighth Circuit (Petition App. B-7 N.7), Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies "in restraint of trade or commerce . . . with foreign *nations.*" Act of July 2, 1890, ch. 647, §1, 26 Stat. 209 (emphasis added).

(continued)

Petitioners' reference to the general interpretive statute of 1871, Act of February 25, 1871, ch. 71, §2, 16 Stat. 431, is a weak reed indeed from which to attempt to derive the requisite degree of importance to merit Supreme Court review. If petitioners were correct that the 1871 statute precludes a finding that states and foreign governments are excluded as persons unless they are specifically defined as such, this Court could not have reached its holding in *Georgia v. Evans,* 316 U.S. 159 (1942).

Some twenty years before the passage of the Sherman Act, this Court stated that a foreign sovereign suing in U.S. courts was to be accorded the same status as "any other foreign person."[7] This equation of the sovereign's status as an artificial person with that of a natural or other juristic person before courts of the United States was a concept well entrenched by the year 1890. In *Cotton v. United States,* 52 U.S. (11 How.) 229, 231 (1850), this Court had highlighted the unreasonable nature of denying to a sovereign as an artificial person the same relief available to other persons:

> Every sovereign state is of necessity a body politic, *or artificial person,* and as such capable of making contracts and holding property . . . It would present a strange anomaly, indeed, if, having the power to make

---

[6] (continued)

Similarly, Section 2 proscribes monopolizing and conspiring and attempting to monopolize commerce "with foreign *nations.*" *Id.* §2 (emphasis added). And Section 1 of the Clayton Act expressly refers three times to commerce "with foreign *nations*" in the definition of the term "commerce." Act of Oct. 15, 1914, ch. 323, §1, 38 Stat. 730 (emphasis added).

[7] In *The Sapphire,* 78 U.S. 164, 167 (1870), the Court simply summarized what long had been the rule:

> *A foreign sovereign, as well as any other foreign person,* who has a demand of a civil nature against any person here, may prosecute it in our courts. (emphasis added).

contracts and hold property as other persons, natural or artifical, they were not entitled to the same remedies for their protection. (emphasis added).

Between 1890 and 1914 when Congress enacted the Clayton Act, foreign governmental entities brought a number of antitrust-type unfair competition suits for damages and injunctive relief against U.S. companies in U.S. courts.[8] In *French Republic v. Saratoga Vichy Co., supra,* 191 U.S. at 438, this Court noted "(i)n such cases, . . . where the government is suing . . . for the prosecution of a private and proprietary instead of a public or governmental right . . ." it is in the same position as any other natural or juristic person with the same rights and subject to the same defenses.[9]

Thus, when Congress used the general word "person"[10] in the Clayton Act as adopted from the Sherman Act, it cannot be presumed to have been unaware that this Court consistently had recognized that foreign governmental entities were to be treated as any other juristic or natural person.[11] To conclude that Congress intended to except foreign

[8] *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427 (1903); *La Republique Francaise v. Schultz*, 94 Fed. 500 (S.D.N.Y. 1899); *City of Carlsbad v. Kutnow*, 68 Fed. 794 (S.D.N.Y. 1895); *City of Carlsbad v. Schultz*, 78 Fed. 469 (S.D.N.Y. 1897).

[9] The rule has been summarized as follows: "A foreign sovereign plaintiff 'should so far as the thing can be done be put in the same position as a body corporate.'" *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-135 N.2 (1938).

[10] In *Nardone v. United States*, 302 U.S. 379, 384 (1937), the Court stated the general principle long-recognized in this country and in England that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong." *See also Stanley v. Schwalby*, 147 U.S. 508 (1893).

[11] By its very language, Section 4 is inclusive, not exclusive. Senator Edmonds, a principle draftsman of the bill which became the Sherman Act, summarized the framework of the bill as follows: "Then we say that *anybody*, without respect to the amount in controversy, may bring suit in the circuit court." 21 Cong. Rec. 3149 (1890) (emphasis added).

governments from that class of persons entitled to recover damages for antitrust violations would require clear evidence of such intent in view of the cases and the policy underlying the antitrust laws.

C. Petitioners' Own Conduct Refutes the Need for This Court to Examine the Question.

The asserted importance of this issue is negated by petitioners' own conduct in delaying its resolution. As noted, it was petitioners who frustrated interlocutory review of the "person" issue in the Second Circuit by dismissing their appeal in the *Kuwait* action.[12] It was petitioners who declined to seek immediate certification of the *Philippines* ruling despite plaintiff's agreement and the court's willingness to certify the issue. It was not until three years after the initial ruling of the District Court and six months after its affirmance of that ruling in the *Philippines* case that defendants suddenly were impressed with the issue's importance. Petitioners' newly discovered interest in the resolution of the issue appears to have coincided with a determination that the imminent tolling of the statute of limitations made it unlikely that additional foreign government actions would be filed.

D. Petitioners' Contention of Importance Is Not Supported by Their Speculative Assertions of Adverse Consequences That May Flow from the Decision.

Petitioners' remaining assertion of importance rests upon a prediction of disastrous consequences if the decision below is not reversed immediately. Petitioners' conjecture, unsupported by the record or any factual basis, that foreign governments may flock into court seeking to recover

[12] Since the district court ruling applied equally to Vietnam, petitioners' failure to prosecute the appeal to a decision is incompatible with their present position that this Court should hasten to decide the question. *See* p. 3, *supra.*

damages does not convert this issue into a question demanding immediate consideration by the Supreme Court.[13] It is instructive to note that during the three-year period between the initial decision of the District Court and the tolling of the statute of limitations in December 1974 only seven[14] foreign governments instigated recovery actions and of these seven only five remain as plaintiffs.[15] Further, neither petitioners nor respondents can cite any antitrust litigation initiated by a foreign sovereign in any action other than the broad spectrum antibiotics actions since the District Court's 1971 decision confirming the right of foreign governments to bring suits under Section 4 of the Clayton Act.

Petitioners' statement that " . . . it appears that the cases against petitioners are the first to be reported in which foreign countries have asserted a right to treble damages," (Petition, pp 17-18) is misleading. Petitioners have

[13] As to defendants' suggestion that American companies may be affected by the acts of foreign governments taken in a sovereign rather than a proprietary capacity, and that such unspecified actions somehow justify collusive activities including monopolizing and price fixing, the speculation simply is irrelevant to the question presented. Moreover, as defendants acknowledge (Petition, p. 11, No. 6), the Executive Department under the auspices of the Department of Justice has sanctioned and probably encouraged such joint action as may be necessary for the protection of legitimate business interests of American companies. Finally, we note that any action brought by a foreign government pursuant to the provisions of the Clayton Act would be conducted in United States courts and with reference to the laws of the United States and not those of any foreign country. No damages can be awarded except upon showing that foreign purchasers were injured in their business or property by acts in violation of the antitrust laws of the United States.

[14] The Philippines, India, Iran, West Germany, Colombia, Spain and South Korea.

[15] Spain and South Korea filed voluntary dismissals of their actions. As noted, *supra*, p. 2, the Republic of South Vietnam was involuntarily dismissed for lack of a viable government to pursue the action.

knowledge that in the electrical equipment cases the Republic of India in its own right, together with certain of its state-owned corporations[16] and several political subdivisions brought suit and participated in the settlement entered into by defendants in those actions.[17] Petitioners' representation to the Court is intended to suggest that importance of the standing question should be inferred because no foreign government heretofore has appeared as a damage claimant. In fact, the appearance of India as a plaintiff almost fifteen years ago illustrates the exaggerated nature of petitioners' "harmful consequences" argument.

The conclusion is inescapable that the passage of time since the District Court decision of 1971 has diminished the asserted importance of this question. Intervening years have witnessed no discernable increase in litigation by

[16] Any other interpretation than that foreign sovereigns purchasing in a proprietary capacity qualify as persons would create the anomalous situation in which foreign sovereigns are deprived of standing to sue while their wholly-owned government corporations possess such rights. The statute gives as an example of entities included as persons, "corporations . . . existing under or authorized by the laws of . . . any foreign country." 15 U.S.C. §12 (1970).

[17] *E.g., The Republic of India and the Mysore State Electricity Board v. General Electric*, Civ. Action No. 30965 (E.D. Pa. filed Feb. 5, 1962). Petitioners' misleading suggestion that these actions are the first in which foreign governments have brought claims is surprising since they had acknowledged the suit by India in an April 22, 1971 letter to the District Court. App. B. Included as Appendix C is an April 18, 1971 letter to Judge Lord (copy to petitioners) setting forth the conclusion of the Department of Justice that foreign government standing was affirmed in an unreported decision of the District Court for the Eastern District of Pennsylvania. The obligation not to rest upon disclaimers of knowledge of "reported" decisions is all the more apparent since it is petitioners who attempt to capitalize on the false concept of importance derived from the inaccurately asserted novelty of the issue.

foreign governments to recover overcharges based upon antitrust violations actionable under the Clayton Act. Neither has Congress expressed any interest in amending Section 4 to alter the result reached.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDICES

APPENDIX A

(Transcript of Pretrial Conference, November 1, 1972)

[80] * * * not to afford such a remedy. We also suggested that Cooper makes clear that's it not the function of the courts to indulge in the business of policymaking in the field of antitrust law.

Now, I would like, just to supplement our briefs on that matter, Your Honor, I would like to refer you to the Flood case, which I am sure you are familiar with, where the Supreme Court again refused to overrule the old Federal baseball case and pointed to the fact that Congress should not act, and it was a field in which Congress should act. So here is a re-emphasis of the point as late as this year of the Congressional inactivity issue that we raised. And I want to put that before the Court also.

We strongly urge, Your Honor, therefore, that the motion to strike should be denied, and that the Court should exercise this jurisdiction and permit discovery into the capacity and the authority of the Bank of the Philippines to bring this action on behalf of the government of the Philippines.

THE COURT: With regard to your comments on the previous ruling in the Kingdom of Kuwait — I think that's right.

MR. VON KALONOWSKI: I think that's right, Your Honor.

THE COURT: — I have reflected on it. I probably — well, it would be my ruling that I would not change that, and that I will bring — if the Philippines has standing, I will bring it within the purview of that. But I would be willing to certify it, if it would help you any.

MR. VON KALONOWSKI: I think, Your Honor, we might desire that. I think it's a point that Your Honor recognizes as an important one and should have ultimately a decision by the Supreme Court on that fact.

THE COURT: I have no objection to that, if you want it certified. I thought you had appealed from it when it was originally given a year and a half ago, but there may have been some other reasons for that.

MR. VON KALONOWSKI: Yes, we would like it certified.

THE COURT: To the extent I can incorporate that into —

MR. VON KALONOWSKI: The Philippines.

THE COURT: Yes. I don't know whether you are able to revitalize that. If we say it's a law of the case, whether you can go on at each new segment of it. But I have no objection to it. Now, the plaintiffs —

[82] MR. VON KALONOWSKI: Well, I think that we could, Your Honor. I think that when this flood case came down it strengthens our argument that we made in the earlier case and indeed in a motion here in the Philippine case.

THE COURT: Mr. Rigler.

MR. RIGLER: Your Honor, on the standing issue, I remind the Court that we were the moving party there, so obviously we are happy to have it certified. We did that to give the defendants the opportunity to raise it at the appellate level.

THE COURT: All right.

MR. RIGLER: A couple of brief comments on Mr. von Kalonowski's presentation. First of all, we stand on the cases cited in our brief. I think that they clearly point in the direction I was indicating.

Mr. von Kalonowski said that the act of state doctrine appeared to him to apply only to expropriation cases. I believe that the Bank of Spain case, Banco Espanol case, which we cited in our brief was not an expropriation case. However, a fair reading of the entire string of cases dealing with the act of state doctrine will disclose absolutely no limitation to expropriation situations. I notice Mr. von Kalonowski had to say that he depicted that from these

decisions or he thought that is what they might infer. That is not a part of the act of state doctrine.

APPENDIX B

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April 22, 1971

Honorable Miles W. Lord
Judge, United States District Court
District of Minnesota
Federal Courthouse
4th and Marquette
Minneapolis, Minnesota 55401

Re: Republic of Vietnam v. Pfizer, et al.
and State of Kuwait v. Pfizer, et al.

Dear Judge Lord:

On behalf of defendants, I would like to respond briefly to Mr. Paul Owens' letter to you of April 18 referring to the United States Government's amicus position in the Kuwait and Vietnam cases that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act.

While it may be correct that the Republic of India was a named plaintiff in several electrical equipment treble damage cases, it certainly is not clear that the issue of the Republic's own standing to sue was presented to the Court in Philadelphia in 1963 or that the judges there decided that issue. It definitely cannot be said, on the basis of the transcript and order provided by Mr. Owens or on the basis of any information we have, that "the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented" and that

denial of defendants' motions there "necessarily involved a holding" that foreign governments are "persons," as Mr. Owens argues.

Counsel for both sides in those cases, and indeed Judge Joseph Lord himself, all stated the issue as involving the standing of a government corporation organized under Indian law. (Tr. 143-45, 155, 157) Moreover, the Order of June 21, 1963 is not explicit.

On that record, defendants urge that this Court cannot find precedential support for the position of Kuwait and Vietnam. It seems to us that a decision as important as this—whether foreign governments may maintain treble damage actions—and with such far-reaching implications must be based on firmer ground. The Antitrust Division more appropriately should address its argument to the Congress. Thus we renew our request that defendants' motions to dismiss these two cases be granted for the reasons stated in our briefs and oral argument.

If the Court is not so inclined, defendants are prepared to resume argument, at the Court's convenience, on the remoteness questions presented in their motion to dismiss the Vietnam case.

Yours very respectfully,
/s/ JHM
John H. Morrison

JHM:gb

cc: John T. McDermott, Esq.
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APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

RWMcL:LB:PAO
60-21-139

April 18, 1971

Honorable Miles W. Lord
United States District Court
Minneapolis, Minnesota 55401

Re: The Republic of Viet-Nam v. Chas. Pfizer, et al (70 Civ. 877) and The State of Kuwait, et al. v. Chas. Pfizer, et al. (69 Civ. 4091) - S.D.N.Y.

Dear Judge Lord:

On March 16, 1971 the United States filed a brief as *amicus curiae* in the above captioned cases in support of the position that foreign governments are "persons" within the meaning of Section 4 of the Clayton Act entitled to maintain treble damage actions.

During the course of my oral argument on this issue at the hearing on March 16, 1971, the question arose (Tr. pp. 205-8) as to whether the courts have ever previously ruled upon this question and, more specifically, whether in the electrical equipment cases the Government of India had been held to be a person entitled to maintain a treble damage action for damages sustained on its purchases of electrical equipment. I advised the court that I had been informed that the standing of the Government of India and certain of its instrumentalities to maintain such suits had been upheld in an unreported decision (Tr. 204-206). This

representation was challenged by Mr. Morrison who presented the oral argument on behalf of the defendants.

I have made a further inquiry into this subject and have learned that there were some nine treble damage actions filed in the Eastern District of Pennsylvania based on purchases of electrical equipment.* The plaintiffs in various of these actions were the Government of India, the Damodar Valley Corporation (a wholly owned Government corporation similar to our TVA created by act of the Indian Parliament), and certain government owned public utilities of the States of India such as the Mysore State Electricity Board, the Rajasthan Madras State Electricity Board and the Punjab State Electricity Board. The court records disclose that the Republic of India itself, as distinguished from its instrumentalities, was named plaintiff in at least five of these actions, *viz.*, Civil Actions No. 30965, 30967, 30971, 30973 and 30974.

Motions to dismiss certain of these actions were filed on the ground that the Indian Government and its various instrumentalities were not persons entitled to maintain treble damage actions. The issue was argued before Chief Judge Thomas J. Clary and Judge Joseph S. Lord, III, on June 18, 1963. I have obtained and am enclosing a copy of the transcript of the oral argument held on this issue.

I think it is clear from the transcript that the question as to whether a foreign government has standing to maintain a treble damage action was squarely presented.

On June 21, 1963 Chief Judge Clary and Judge Lord entered an order denying the defendants' motion to dismiss

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*The reason for the fact that there were nine different cases appears to be that the complaints sought to track the several criminal indictments, each of which was directed at a price fixing conspiracy affecting different kinds of electrical equipment such as turbine generators, power capacitors, industrial control equipment, etc.

the complaints on this and other grounds. The denial of these motions to dismiss necessarily involved a holding that the Republic of India and its instrumentalities were persons within the meaning of Section 4 of the Clayton Act entitled to maintain a treble damage action. Set out below is the text of the court's order entered in Civil Actions 30965-974 as it appears in the court records.

> And now, to wit, this 21st day of June 1963, upon consideration of the various motions of defendants to strike the allegations from the complaints in the above captioned actions, to dismiss some of the complaints in the above captioned actions, and for more definite statements in some of the above captioned actions,
>
> It is hereby ordered and decreed that all of the defendants' motions to strike, to dismiss and for more definite statements directed to the above captioned complaints are hereby denied. Defendants shall have thirty (30) days from the entry of this order to answer the complaints, except that the answers to Civil Action #30974 may be deferred pending amendment by plaintiffs to allege which count or counts the purchases belong.
>
> /s/ Thomas J. Clary, C.J.
> /s/ Joseph S. Lord, III

Since the text of the statute makes it undisputably clear that foreign corporations have a right to maintain treble damage actions, I argued that it would frustrate the clearly evident Congressional intent to deny a foreign government the right to maintain an action for damages on the purely technical ground that it made its purchases directly in its own name and not through a wholly owned government corporation.

The Congressional purpose to enhance the effectiveness of the antitrust laws by authorizing private treble damage

actions to supplement federal government enforcement efforts must be given judicial effect if it is clearly discernible behind the specific manifestation in the text of the statute. This is precisely what was done in *Georgia v. Evans*, 312 U.S. 159 (1942) where the Supreme Court recognized the right of the state to maintain a treble damage action even though states were not specifically enumerated in the definition of "person" as set out in the statute.

Similarly, the Congressional purpose should be effectuated by recognizing the standing of foreign governments to maintain treble damage actions. Where the basic policy of the statute is so plain it would be a misfortune if a narrow or grudging process of construction were to confine the effect of the statute to the particular cases to which Congress adverted so as to thwart the Congressional purpose and to discriminate against injured parties whose equity is indistinguishable.

Sincerely yours,

RICHARD W. McLAREN
Assistant Attorney General
Antitrust Division

By: /s/ Paul A. Owens
Paul A. Owens
Attorney, Department of Justice

Enclosure

cc.: All defense counsel of record
Counsel for The Republic of Viet-Nam
Counsel for the State of Kuwait
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Judicial Panel on Multidistrict Litigation

IN THE

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,
Respondents.

PETITIONERS' JOINT REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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January 10, 1977

INDEX

TABLE OF AUTHORITIES

Cases

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Petitioners respectfully submit this reply brief in support of their petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

QUESTION PRESENTED

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

FURTHER STATEMENT

Since the filing of the petition in these cases, the District Court has dismissed the case of the defunct Republic of Vietnam, and counsel for Vietnam have filed notice of appeal.[1]

REPLY TO RESPONDENTS' ARGUMENT

Respondents do not deny the fundamental importance of the question presented, nor that the practice of this Court sanctions review by certiorari of important questions which have been decided by the Court of Appeals pursuant to the Interlocutory Appeals Act, 28 U.S.C. § 1292(b)[2]. Rather, respondents assert that the question presented "does not merit immediate consideration by this Court" (Opp. Br. 4); that, unlike respondents themselves, other foreign governments will not "flock" to our courts to seek treble damages (Opp. Br. 9); and that "the passage of time since the District Court decision of 1971 [in a related case, subsequently dismissed] has diminished the asserted importance of this question." Opp. Br. 11.

We submit, however, that events since the Arab Oil Boycott of 1973 have increased the need for a decision by this Court whether foreign governments may claim treble damages under our antitrust laws. The decision of the Court of Appeals was itself an important judicial development which, for the first time, affirmed the existence of this novel cause of action at the appellate level and brought the opportunity for review by this Court.

1. *The Republic of Vietnam* v. *Pfizer, Inc.*, No. 4-71 Civ. 402 (D. Minn. Dec. 2, 1976) (order dismissing action), *appeal noticed* (8th Cir. Dec 23, 1976). Respondent's theory appears to be that the *Vietnam* case should merely be "suspended" as diplomatic relations may be established with the present Vietnamese government. *See Pfizer Inc.* v. *Lord and The Republic of Vietnam*, 522 F.2d 612, 613 n.3 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976).

2. *See* cases cited, Petition (hereafter "Pet.") at 10.

Respondents' chief argument appears to be that petitioners' counsel should have obtained an earlier appellate decision so as to bring the issue to this Court even sooner, and that, in view of an alleged lack of diligence, "[t]he asserted importance of this issue is negated." Opp. Br. 9. Respondents do not contend that they were prejudiced by the alleged delay. Their argument is not relevant to qualification of the issue as "an important question of federal law which has not been, but should be, settled by this court." Sup. Ct. Rule 19(1)(b). The argument is also wrong on the facts.[3]

3. Contrary to respondents' suggestion (Opp. Br. 2), petitioners timely moved in 1971 to dismiss *both* the *Kuwait* and *Vietnam* cases, the only such cases then pending. When their motion was denied in the *Kuwait* case, they sought and obtained leave to appeal the "person" issue to the Court of Appeals. That appeal was dismissed only when Kuwait decided to withdraw its claim. Respondents argue that the appeal was "not mooted" (Opp. Br. 3) because, in a footnote to its opinion in the *Kuwait* case, the District Court had said that the same holding "will apply" to the *Vietnam* case. *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 315, n.1 (S.D.N.Y. 1971). But the District Court had not entered an order in the *Vietnam* case (because "it raises additional issues," *id.*) and the Court of Appeals had not agreed to hear an appeal in that case.

Faced with activity on many fronts in this consolidated litigation, the District Court did not enter another order on the "person" question until January 16, 1974, this time in the *Philippines* case. Respondents' assertion that "defendants declined the invitation of the Philippines to seek immediate certification" (Opp. Br. 3) is unsupported by citation to the record and is belied by the portion of the record reprinted in respondents' own Appendix, for that transcript shows that both the Philippines' counsel and petitioners' counsel (Mr. von Kalinowski) had already asked the court to certify its decision for appeal. Opp. Br. App. 2a. When the court entered its decision on January 16, 1974, however, it chose not to include a certification. *See* Pet. App. C-8.

On June 25, 1974 petitioners timely renewed their request for certification in the *Philippines* case and urged the District Court to decide the "person" question in the *Vietnam* and *Iran* cases and to certify that decision, too. It was not until December 27, 1975 that the District Court decided to grant the request as to certification of the *Philippines* case (Pet. App. E-5, amending order, Pet. App. C-1); ruled for the first time that plaintiffs Vietnam, Iran and India were also "persons"; and certified its decision in the latter cases as well. Pet. App. D-2, E-5.

The true significance of respondents' digression upon proceedings in the District Court appears to be that they cannot find genuine reasons why this Court should not review the decision of the Court of Appeals.

A. Reply as to "Congressional Intent"

Respondents would obscure the fact that the Court of Appeals reached its conclusion despite the belief of five of the eight judges sitting *en banc* that Congress had no "legislative intent whatsoever" as to grant of the treble damage right to foreign governments. Pet. App. B-8, A-2. Respondents insist that the Eighth Circuit did indeed find a "Congressional intent to include foreign governments as persons" (Opp. Br. 6), but the claim is based on a single sentence from the majority opinion, which confirms that this Court's decision in *Georgia* v. *Evans* was the sole basis for the imputation of an intent to Congress.[4] Three of the six members of the majority made this point clear indeed when they stated in concurrence:

> [We] think the result is mandated by *Georgia* v. *Evans* . . . . [We] believe, however, that Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act.
>
> Concurrence of Judge Ross, Pet. App. B-7-8; joined by Chief Judge Gibson and Judge Webster, Pet. App. A-1. *See also* dissent of Judges Bright and Henley, Pet. App. A-2.

Thus, three judges in concurrence and two in dissent formed a majority of the Court of Appeals who could find no basis for imputation of a genuine intent to Congress.

4. "In view of the holding in [*Georgia* v. *Evans*, 316 U.S. 159 (1942)] that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7.

Respondents do not deny that in 1874, upon enactment of the Revised Statutes, and only sixteen years before passage of the Sherman Law, Congress had purposely narrowed the statutory definition of "person" so as to omit "bodies politic" from the list of entities to which "the word 'person' may apply and be extended" in federal statutes.[5] Instead, respondents describe the amendment as "a weak reed indeed from which to attempt to derive the requisite degree of importance to merit Supreme Court review." Opp. Br. 7. But it is the question presented which is important. The amendment shows that the question was wrongly decided.

Congress was indeed aware, as respondents suggest (Opp. Br. 8), that our courts had sometimes described governments as "artificial" persons entitled to vindicate their property rights in court. *E.g., Cotton* v. *United States*, 52 U.S. (11 How.) 229 (1850); *see The Sapphire* 78 U.S. (11 Wall.) 164 (1870). That is one of the reasons why Congress took care upon enactment of the Revised Statutes in 1874 to limit the statutory rights conferred upon such governments by legislative reference to "persons." The purpose of the 1874 amendment becomes significant indeed because respondents have found nothing in the legislative background to indicate an intent to extend the treble-damage right to foreign governments.[6] The Court of Appeals based

5. *See* 1 U.S.C. § 1 (1970); interpretive statute originally enacted as Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, repealed and superseded retroactive to the date of initial enactment by Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092, enacting Rev. Stat. tit. 1, ch. 1, § 1 into positive law. For the purpose of the 1874 amendment, *see* Revisers' Note, 1 *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872).

6. Senator Edmunds was thinking of individuals when he said that "anybody, without respect to the amount in controversy, may bring suit . . ." *See* Opp. Br. 8 n.11. In the same speech he used "anybody" interchangeably with "any man." *See* 21 Cong. Rec. 3149 (1890). Senator Sherman himself had said that the private damage action was available to "citizens of the United States." *Id.* 2564.

its decision solely upon the result this Court reached in *Georgia* v. *Evans*, without analysis of policy. In deciding the case on that basis, the judges of the Court of Appeals in effect invited this Court to review the scope of its own prior decision.

B. Respondents' Authorities Give Them No Support

Respondents argue that the Court of Appeals was not wrong on the merits, but the authorities they cite give no support. Thus, foreign sovereigns brought no "antitrust-type" suits between 1890 and 1914. Opp. Br. 8. The suits in question were brought in the interest of a private corporation or municipal body.[7] The suits concerned unfair competition, a common-law tort akin to fraud, not rights granted by federal statute. Respondents' reliance on the statement in *Nardone* v. *United States*, 302 U.S. 379, 384 (1937), that "the sovereign is embraced by general words of a statute intended to prevent injury and wrong" (Opp. Br. 8 n.10) is also misplaced, for this Court has established that "the sovereign," the United States itself, is not embraced by the reference to "persons" in this particular statute. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941).

The "executive interpretation" of the statute (*see* Opp. Br. 5), newly asserted in the lower courts, gives no guidance as to the intent of Congress in 1890. Respondents acknowledge that the Executive has previously sanctioned joint resistance by American companies against various oil-producing states (Opp. Br. 10 n.13), and the practice suggests a more traditional view on the part of the Executive that such governments have no right to seek treble damages.[8]

Finally, respondents suggest that Congress could not have intended that foreign governments acting in a proprietary capacity should have different rights or liabilities than foreign corporations, particularly government-controlled foreign corporations. Opp. Br. 11 n.16. Only last year, however, Congress recognized the special status of foreign sovereigns in providing that, even when acting in a proprietary capacity, a foreign state may not be held liable for "punitive damages," even though its "agency or instrumentality" may be so liable. 28 U.S.C.A. § 1606 (1976 Supp. IV).[9]

Since the filing of the petition herein, the Federal Trade Commission, too, has proposed a definition of the term "person" to be used in the recently-enacted Section 7A of the Clayton Act, 15 U.S.C.A. § 18a (1976 Supp. IV),[10] which provides that " 'person' shall not include any foreign

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7. In *French Republic* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903), the French Republic was only "nominally the plaintiff" with "little" if any "interest in the litigation." The real party in interest was a private bottling company which leased the Vichy springs from the government. *Id.* 437-38. The same situation existed in *La Republique Francaise* v. *Schultz*, 94 Fed. 500 (S.D.N.Y. 1899), *aff'd*, 102 Fed. 153 (2d Cir. 1900). *City of Carlsbad* v. *Schultz*, 78 Fed. 469 (S.D.N.Y. 1897), and *City of Carlsbad* v. *Kutnow*, 68 Fed. 794 (S.D.N.Y.), *aff'd*, 71 Fed. 167 (2d Cir. 1895), both involved a municipality.

8. Respondents do not contest the relative novelty of their claims, but insist that the petition should have mentioned several *unreported* cases filed in the Eastern District of Pennsylvania in 1962 and said to have been the first in which a foreign government (India) claimed treble damages. Opp. Br. 10-11. But the District Court held that these cases had no value as precedent, since a government-controlled electric company (e.g., "the Damodar Valley Corporation") was a named plaintiff in each case and there was no evidence that India's right to sue, absent such a corporation, was placed in issue. *See In Re Antibiotic Antitrust Actions*, 333 F.Supp. 315, 316 n.3 (S.D.N.Y. 1971).

9. Foreign Sovereign Immunity Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2894 (Oct. 21, 1976).

10. Enacted by Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390 (Sept. 30, 1976).

state, government or agency thereof (other than a corporation engaged in commerce or in any activity affecting commerce)." 41 Fed. Reg. 55490 (Dec. 20, 1976). The Antitrust Division of the Department of Justice concurred in this definition.[11]

Similarly, a recent decision of the United States District Court for the Southern District of New York holds that Congress did not intend the term "person," as used in the Securities Exchange Act of 1934, to embrace the Province of Newfoundland. *Greenspan* v. *Crosbie*, [1976] FED. SEC. L. REP. (CCH) ¶ 95,780 (S.D.N.Y. No. 74 Civ. 4734, Nov. 23, 1976).

These developments bring further confirmation that the Court of Appeals erred, and that the term "person," as used in federal economic legislation, should not be mechanically extended to include foreign governments without consideration of the purpose and intent of Congress.

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11. *See* 15 U.S.C.A. § 18a(d)(2)(A) (1976 Supp. IV); 41 Fed. Reg. 55488 (1976).

CONCLUSION

We respectfully submit that this petition should be granted, and the question now presented, which was left unresolved by the Court's contrasting decisions in *Georgia* v. *Evans*, 316 U.S. 159 (1942), and *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), should be settled without delay.

Respectfully submitted,

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January 10, 1977

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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THE GOVERNMENT OF INDIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's order of January 25, 1977, inviting the Solicitor General to express the views of the United States.

DISCUSSION

The issue is whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 38 Stat. 730, 731, 15 U.S.C. 15, entitled to maintain an action for treble damages based upon violations of the antitrust laws. Section 4 provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages[1]. The Act's

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[1] Former Section 7 of the Sherman Act, 26 Stat. 210, repealed in 1955, 69 Stat. 283, contained similar language.

definition of "person" includes corporations and associations existing under federal, territorial, state, or foreign law (15 U.S.C. 12), but makes no reference to governmental entities, foreign or domestic.

There appears to be no express legislative history indicating Congress' intent, one way or another, with respect to treble damage actions by foreign or domestic sovereigns. Whether foreign sovereigns are "persons" entitled to sue under Section 4 depends largely upon the general policy reflected in the statute, and the general policy of the United States opening its courts to foreign sovereigns.

The parties pressed upon the court below two competing analogies. Petitioners urged that the case was controlled by *United States* v. *Cooper Corp.*, 312 U.S. 600. The Court there held that the United States was not a "person" entitled to sue for damages under former Section 7 of the Sherman Act because Congress had provided the United States with an array of public remedies and sanctions not available to others who might be injured by antitrust violations. Respondents invoked *Georgia* v. *Evans*, 316 U.S. 159, where the Court held that the State of Georgia was a "person" entitled to sue for treble damages because it lacked the public enforcement powers of the United States, and thus had no redress for violation of the Sherman Act except the private action. The Court pointed out that *Cooper* had not ruled "that the word 'person,' abstractly considered, could not include a governmental body." 316 U.S. at 161.

The United States agrees with the *en banc* decision of the court of appeals that permitting foreign governments to sue for treble damages effectuates the congressional purpose to afford "any person" injured in his business or property by an

antitrust violation a treble damage remedy.[2] Compare *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236; *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660; *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 648.[3]

The purposes of the treble damage remedy are to provide compensation to the victim of antitrust violations, and to supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266; *Zenith Radio Corp.* v. *Hazeltine Research,*

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[2]Petitioners rely on a general statute defining terms in the Revised Statutes, passed sixteen years before the Sherman Act, to show that Congress intended to define the word "person" so as to exclude states, territories, and foreign governments. Act of June 22, 1874, 18 Stat., pt. 1, 1092; Revisers' Note, 1 *Revision of the United States Statutes as Drafted by the Commissioners* 19 (1872); Pet. 12-14. But this proves too much. If Congress intended to exclude domestic states as well as foreign nations from the definition of "person," the words "any person" in the Sherman Act should not have been interpreted to include states, as the Court did in *Georgia* v. *Evans*, 316 U.S. 159. The Court has rejected the automatic approach petitioners advocate in favor of one which considered "[t]he purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute" as "aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law." 316 U.S. at 161.

[3]In *Evans* the court also noted that it would be unreasonable to deny to the State of Georgia the right to sue for treble damages under the Sherman Act when the Court had previously held, in *Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390, that a municipality within the State had this right. *Georgia* v. *Evans*, *supra*, 316 U.S. at 162. Since a foreign corporation is permitted to sue for antitrust damages (15 U.S.C. 7, 12), it could do so even if its stock was wholly owned by a foreign government. Cf. *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524, 528-529 (C.C.P.A.). There is no reason why a foreign state's failure to trade through the corporate form should bar it from asserting antitrust injuries.

Inc., 395 U.S. 100, 130-131; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139. Permitting private antitrust damage suits by foreign governments would further these objectives.

In view of the express purpose of the antitrust laws to protect both domestic commerce and "commerce with foreign nations" (15 U.S.C. 1, 2, 12), and the longstanding principle that foreign sovereigns may sue in the courts of the United States to the same extent as a domestic corporation or individual (*The Sapphire*, 78 U.S. 164, 167-168),[4] we submit that Congress did not intend to exclude foreign governments from the categories of "persons" authorized to maintain antitrust treble damage suits.[5] The Court's statement in *Georgia* v. *Evans*, with the following substituted words, is equally applicable here: "We can perceive no reason for believing that Congress wanted to deprive a [foreign government], as purchaser of commodities shipped in [foreign] commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act" (316 U.S. at 162).

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[4]It is a well-established rule that a foreign nation is ordinarily accorded the same standing to sue in our courts as domestic plaintiffs. *The Sapphire*, *supra*; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Thus, a foreign state has been accorded standing even where it brought suit under a federal statute that enumerated those who could sue, but did not include foreign states. *Swiss Confederation* v. *United States*, 70 F. Supp. 235, 236-237 (Ct. Cl.), certiorari denied, 332 U.S. 815. See, also, *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 399 (C.A. 2), certiorari denied, 275 U.S. 571.

[5]Such actions, of course, must meet the statutory requirement that the plaintiff allege and prove injury to its business or property. Cf. *Hawaii* v. *Standard Oil of Cal.*, 405 U.S. 251; *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, No. 75-904, decided January 25, 1977.

Petitioners contend that if foreign governments may sue under the antitrust laws, the foreign economic relations of the United States will be injured, and grave inequities to American companies victimized by foreign cartels and expropriations will result.[6] As the court of appeals recognized, however (Pet. App. B3, n. 4), these are arguments to be addressed to Congress. Indeed, in certain limited circumstances, Congress had made special provision for collective activity by American firms in order to resist foreign cartels. *E.g.*, The Webb-Pomerene Act, 40 Stat. 516, 15 U.S.C. 61-65; see *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199. Moreover, any policy considerations justifying special antitrust treatment for United States companies that do business with foreign governments do not justify implying a legislative intent to close American courts to foreign governments that have been the victims of antitrust violations perpetrated by American companies.[7]

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[6]This argument is premised in part on the ground that if, after a foreign nation expropriated the properties of American companies and those companies then retaliated by engaging in a group boycott of the product produced from the seized properties, the foreign nation could sue the American companies in our courts under the antitrust laws. However, the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, Section 4(a), 90 Stat. 2891, 2894, 28 U.S.C. 1605(a)(3), 1607, permits in certain cases a counterclaim to a suit by a foreign state alleging that the foreign state has taken property in violation of international law. In any event, the possibility that allowing foreign governments to sue might cause inequities in an occasional unusual situation hardly supports denying relief to foreign governments that are the innocent victims of antitrust violations.

[7]In their Joint Reply Brief, page 7, petitioners refer to the exemption from punitive damages for foreign nations under the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, Section 4(a), 90 Stat. 2894, 28 U.S.C. 1606. Petitioners also refer to the exemption for foreign nations from the pre-merger notification requirement of Section 7A of

The Department of State, which is primarily responsible for the conduct of this Nation's foreign relations, has advised that it would anticipate no "foreign policy problems" from construing Section 4 of the Clayton Act to permit foreign governments to sue for treble damages.[8]

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the Clayton Act. Pub. L. No. 94-435, Title II, Section 201, 90 Stat. 1390; 41 Fed. Reg. 55488, 55490. Petitioners' reliance upon these statutes is misplaced; they shed no light upon whether Congress intended to deny foreign governments the right to sue provided in Section 4.

Greenspan v. *Crosbie*, [1976] Fed. Sec. L. Rep. (CCH), para. 95,780 (S.D. N.Y., No. 74 Civ. 4734, November 23, 1976), which petitioners cite in their Joint Reply Brief, page 8, actually demonstrates the kind of clear legislative intent required to exclude a foreign government from coverage under a federal statute. In *Greenspan*, the court found that the word "person" in the Securities Exchange Act of 1934 did not cover the Province of Newfoundland. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. The court observed, however, that the Securities Act of 1933 included in the definition of "person" a "government or political subdivision," but that this language was dropped from the definition of "person" in the Securities Exchange Act of 1934. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. The court also noted that in 1975, after the suit in *Greenspan* was filed, Congress amended the statute again to include a government or political subdivision. The court reasoned, therefore, that Congress would not have included a government or a political subdivision in the 1975 amendments unless it believed these entities were not covered by the 1934 Act. *Greenspan* v. *Crosbie*, *supra*, at p. 90,827. There appears to be no similar evidence of Congressional intent to deny a foreign state the right to sue under Section 4 of the Clayton Act.

[8] The views of the Department of State were expressed in the attached letter from The Legal Adviser to the Department of Justice, which was submitted to the court of appeals when it reconsidered this case *en banc*.

In sum, while the question presented is not without importance, we submit that the court of appeals correctly decided it.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1977.

[933-1977-03]

APPENDIX A

DEPARTMENT OF STATE

THE LEGAL ADVISER
WASHINGTON

August 10, 1976

Mr. Donald I. Baker
Acting Assistant
Attorney General
Antitrust Division
Department of Justice
Washington, D.C. 20530

Re: Pfizer Inc. v. *Government of India*

Dear Mr. Baker:

We understand that the above entitled litigation has been set for a rehearing *en banc* by the United States Court of Appeals for the Eighth Circuit, on the question of whether a foreign government is a "person" entitled to bring antitrust claims based on injury to its business or property, under Section 4 of the Clayton Act, 15 U.S.C. 15. This is to advise that the Department of State would not anticipate any foreign policy problems if the Court of Appeals *en banc* should reaffirm the Court's earlier decision as well as the position of the United States Government—namely, that foreign governments are "persons" within the meaning of Clayton Act §4.

Moreover, we are not overly concerned about the possibility that a foreign government which has expropriated property of American companies may bring an antitrust action in the United States, challenging a combined resistance among the American companies to the expropriation. If such a case should arise, it is

quite possible that the American companies would have a counterclaim with respect to the legality of the expropriation under international law. See, *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 44 U.S.L.W. 4665, 4670, 4673 (Appendix I n. 1); cf. *National City Bank* v. *Republic of China*, 348 U.S. 356.

Sincerely,
/s/ Monroe Leigh

Monroe Leigh

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,

Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES and THE REPUBLIC OF VIETNAM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' JOINT REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

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April 1, 1977

TABLE OF AUTHORITIES

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PETITIONERS' JOINT REPLY TO THE MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

Petitioners respectfully submit this reply to the Memorandum of the United States as Amicus Curiae (hereafter "Gov. Mem."), filed in response to the Court's order of January 25, 1977.

The Department of Justice does not dispute the importance of the question whether foreign countries are "persons" entitled to sue for treble damages under Section 4 of

the Clayton Act, but it opposes the petition for certiorari on the ground that the question was "correctly decided" by the court of appeals. Gov. Mem. at 7. The basis for the Department's conclusion is said to be that "[t]he United States agrees with . . . the court of appeals that permitting foreign governments to sue for treble damages effectuates the congressional purpose to afford 'any person' . . . a treble damage remedy." Gov. Mem. at 2-3. But no such reasoning is to be found in the court of appeals' decision. The majority based its conclusion on a mechanical application of *Georgia v. Evans,* 316 U.S. 159 (1942), reasoning that since this court had held that a State was a person entitled to sue, Congress must have "intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7. Indeed, five of the court of appeals' eight judges (three in concurrence and two in dissent) indicated that the decision did not effectuate any Congressional purpose since they believed that "Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are 'persons' under the Act." *See* Appendix to the Petition herein ("Pet. App.") B-8, A-1; A-2. The three concurring judges, whose votes controlled the outcome, held that foreign governments were "persons" because they thought that result was "mandated" by this Court's decision in *Georgia v. Evans*, 316 U.S. 159 (1942). Pet. App. B-8, A-1. But those judges were manifestly troubled by the policy implications of their decision, since they stated, not that their decision furthered the intent of Congress, but that, in their opinion, it was "time for Congress to re-examine this extremely important question and clarify it by legislation." Pet. App. B-8.

The Justice Department cites no authority to support its conclusion that it was the intention of Congress to grant the treble damage remedy to foreign governments. Gov. Mem. at 4. Indeed, this Court recently noted that "[t]he

discussions of [the treble-damage remedy] on the floor of the Senate indicate that it was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S.Ct. 690, 696 n.10 (No. 75-904, decided Jan. 25, 1977). It is obvious that such purpose is not furthered by extension of the remedy to foreign governments.

The Department also contends that extension of the remedy to foreign governments would "supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations." Gov. Mem. at 3. But it is improbable that Congress would have thought it appropriate to recruit foreign governments, most of which do not espouse our nation's antitrust principles, to assist the Executive Branch in enforcing our laws.

The Justice Department does not dispute our arguments that extension of the remedy to foreign governments could have adverse effects upon the commercial interests of the United States. Rather, it asserts that "these are arguments to be addressed to Congress." Gov. Mem. at 5. But the Federal Courts should not impute to Congress an intent to disregard such concerns. The Congresses which enacted the Sherman and Clayton laws were especially alert to foster and protect the American economy. *See, e.g.*, McKinley Tariff Act of 1890[1]; Webb-Pomerene Act of 1918.[2] Those concerns were not discussed upon enactment of the Sherman law because Congress could have had no notion that the Sherman Act's treble-damage remedy could be extended to foreign governments. In drafting the Act, the Senate Judiciary Committee had defined "person" and excluded foreign governments from the definition. *See* 15 U.S.C. §§ 7, 12.[3] Congress was undoubtedly aware that in

1. Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567.

2. Act of Apr. 18, 1918, ch. 50, 40 Stat. 517 (codified as 15 U.S.C. §§ 61-65 (1970)).

3. *See* Pet. at 13 n.10.

1874, sixteen years earlier, it had purposefully narrowed the definition of "person" as used in the Revised Statutes, so as to delete "bodies politic," such as states and foreign governments, from the list of entities to which the term person "may apply and be extended" in federal legislation. *See* authorities cited, Pet. at 12-13. For purposes of the Sherman Act, Congress broadened the general definition somewhat.[4] Congress did not seek to overcome the rule of statutory construction, established by the 1874 statutory amendment and by Supreme Court decision (*see United States* v. *Fox*, 94 U.S. 315, 321 (1876)), that "person" should not be extended to include bodies politic, such as co-equal governments, without special definition.

The Department of Justice argues that the purpose of Congress's definitional amendment of 1874 should simply be disregarded, since it "proves too much," and might be taken to suggest that *Georgia* v. *Evans* itself was wrongly decided. *See* Gov. Mem. at 3 n.2. We have already noted that the amendment and its purpose appear not to have been called to the Court's attention when *Georgia* v. *Evans* was decided in 1942. *See* Pet. at 16.[5] Even if the Court had considered the amendment, however, it might well have concluded that the larger purposes of the Sherman Act's treble-damage remedy, conceived as a remedy for "the people of the United States," dictated extension to the States, as representatives of their citizens. Indeed, since the States had delegated the Commerce Power to Congress

4. The general definition left the courts some discretion providing that person "may apply and be extended" to corporations; the Senate Judiciary Committee removed any doubt in this regard as to the antitrust laws by providing that person "includes" corporations. *See* Sherman Act § 7, 26 Stat. 210. This Court's decision in *United States* v. *Fox*, 94 U.S. 315, 321 (1876), might have been construed to mean that the term "corporation," when used in federal legislation, referred only to corporations organized under the laws of the United States, and the committee also obviated any question in that regard, specifically providing for inclusion of all corporations, regardless of their place of incorporation.

upon ratification of the Constitution, it would have seemed anomalous to conclude that Congress had exercised that power to enact comprehensive antitrust legislation but had chosen to leave the States without remedy thereunder.

Whatever the scope of *Georgia* v. *Evans*, the Justices who joined in that decision would surely have been astonished to learn that in allowing suit by States of the Union, they had "mandated" extension of the treble-damage remedy to foreign governments. As the court of appeals' dissenters observed, "if this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term 'person,' the definition of 'person' now should be even further expanded, then the majority have adopted a questionable principle of statutory construction." A-3. Without analysis of Congressional purpose, the court of appeals has accorded to the world's foreign governments a treble-damage right that Congress chose to withhold from our own government (*see* 15 U.S.C. § 15a) because it feared "the disastrous impact of treble damages upon concerns doing a large proportion of their business with the government." H.R. Rep. No. 422, 84th Cong., 1st Sess. 4 (1955). The impact of treble-damage claims by foreign governments could be even more severe. *See* Pet. 11.

The question presented on this petition is fundamental to the antitrust laws. Denial of the petition for certiorari would not resolve the question. The Eighth Circuit applied *Georgia* v. *Evans* in a mechanical manner that disregarded the policy and purpose of Congress, and its reasoning cannot be regarded as a definitive answer. Even the Department of Justice acknowledges that an "automatic approach" to the definition of person is erroneous, although it tries to ascribe that approach to petitioners rather than to the court

5. Mr. Justice Frankfurter, discussed the definitional statute without reference to the 1874 amendment or its purpose, in a law review article. *See* F. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947).

of appeals' majority. *See* Gov. Mem. at 3 n.2. Denial of certiorari would have the effect of encouraging the world's foreign countries to make a significant investment in lengthy and complex anti-trust litigation before our federal courts, without resolving the essential question whether such countries do have a cause of action. Accordingly, the Court should proceed to resolve the question presented on this petition.

Respectfully submitted,

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April 1, 1977

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INDEX

CITATIONS

Cases

Constitution and Statutes

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Opinions Below

The opinion of the court of appeals, reported at 550 F.2d 396 (8th Cir. 1976), is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at A-1 (disposition on rehearing *en banc*) and B-1 (opinion of the original panel). The relevant decisions of the district court in these cases are unreported but are printed, Pet. App. at C-1 (*Philippines* case), Pet. App. at D-1 (*India* case), and Pet. App. at E-1 (*Philippines, Iran* and *South Vietnam* cases). For an earlier district court opinion in the related *Kuwait* case, see *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971), reprinted in the separate Appendix (A5).

Jurisdiction

The judgment of a panel of the Court of Appeals for the Eighth Circuit was entered on May 19, 1976. A timely petition for rehearing *en banc* was granted and, after such rehearing on August 17, 1976, the judgment of the court of appeals was entered on September 3, 1976. Pet. App. at F-1. The petition for a writ of certiorari was filed within ninety days thereafter, on December 1, 1976, and was granted on April 18, 1977. The Court's jurisdiction rests upon section 1254(1) of title 28 of the United States Code.

Question Presented

Are foreign countries "persons" entitled to sue for treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15?

Statutory Provisions Involved

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

Section 4.

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

38 Stat. 731 (codified at 15 U.S.C. § 15 (1970)).

Section 1.

* * *

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

38 Stat. 730 (codified at 15 U.S.C. § 12 (1970)).

STATEMENT OF THE CASE

Proceedings in the District Court

Respondents India, Iran, the Philippines and South Vietnam sued the petitioning pharmaceutical companies for treble damages, alleging that the companies had violated sections 1 and 2 of the Sherman Act by conspiring to restrain and monopolize trade in tetracycline, a broad spectrum antibiotic (A121, A29, A87, A58).[1] India also alleged a violation of section 7 of the Clayton Act, 15 U.S.C. § 18 (A122). All alleged that they were sovereign states recognized by the United States (A106, A13, A74, A42), and invoked the district court's jurisdiction pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, and 28 U.S.C. § 1337 (A105-106, A12, A71, A41-42).[2]

By way of affirmative defense, petitioners challenged the right of the foreign countries to sue under section 4 of the Clayton Act, contending that such countries were not among the "persons" on whom that section confers a cause of action. Issue was joined by motion to dismiss in the cases of South Vietnam, Iran and India (A1, A101, A133). The Philippines, in turn, moved to strike petitioners' affirmative defense (A10).

Holding that foreign countries are persons entitled to sue for treble damages, the district court granted the Philippines' motion to strike (Pet. App. C-8), denied petitioners' motions to dismiss (Pet. App. D-2, E-5), and also ordered the affirmative defenses stricken in the South Vietnam and Iran cases. Pet. App. E-5.[3] Thereafter, the

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1. The South Vietnam case was dismissed by the district court on December 2, 1976, after receipt of advice that the United States no longer recognized any government as sovereign in the former territory of that republic. Dismissal was affirmed on appeal. *Republic of Vietnam* v. *Pfizer Inc.*, No. 4-71 Civ. 402 (D. Minn. Dec. 2, 1976), *aff'd*, No. 77-1093 (8th Cir. June 15, 1977).

2. For the historical background of the litigation, see the Petition for Certiorari at 2 n.3.

3. The district court did not rule on motions to dismiss the claims of the Federal Republic of Germany and Colombia, the only other foreign countries that have claims outstanding in this litigation. Claims by South Korea, Spain and Kuwait have been withdrawn.

district court held that there was "substantial ground for difference of opinion" as to the correctness of its decisions and certified them for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Pet. App. D-2, E-5.

The Court of Appeals for the Eighth Circuit, which had earlier ruled that the district court's refusal to dismiss the foreign governments' claims could not be challenged on mandamus (*see Pfizer Inc.* v. *Lord*, 522 F.2d 612, 614-15 (8th Cir. 1975)), agreed to hear the interlocutory appeal.

The Decision of the Original Panel of the Eighth Circuit

On May 19, 1976 a panel of the Eighth Circuit affirmed the judgment of the district court. The panel noted that this is a case of "first impression" (Pet. App. B-2, 550 F.2d at 397), and stated that "whether a foreign government may sue under the Clayton Act turns on the interpretation of the statute and nothing more. Our task is to determine the intent of Congress in passing the Act." Pet. App. B-3, 550 F.2d at 397. It observed that "[t]wo decisions of the United States Supreme Court offer guidance . . . ." Pet. App. B-4, 550 F.2d at 398. In one, *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States is *not* a "person."[4] In the other, *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held that a State of the United States *is* a "person" entitled to sue for treble damages. Comparing the two cases, the panel concluded that *Georgia* v. *Evans* was controlling as to the right of a foreign country to sue. "In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the

4. Thereafter, Congress gave the United States a right to sue for *single damages*, but withheld the treble damage remedy. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified at 15 U.S.C. § 15a (1970)).

antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right." Pet. App. B-7, 550 F.2d at 399.

One member of the panel, Judge Ross, concurred "because I think the result is mandated by *Georgia* v. *Evans*," but added that, in his view,

> Congress . . . gave no consideration nor did it have any legislative intent whatsoever, concerning the question of whether foreign governments are "persons" under the Act. In my opinion it is time for Congress to re-examine this extremely important question and clarify it by legislation.
> Pet. App. B-7 to B-8, 550 F.2d at 399-400.

The Decision *En Banc*

After rehearing *en banc* before the eight judges of the circuit in regular active service (including all three members of the original panel), six judges adhered to the decision of the original panel. Three of the six (Chief Judge Gibson, Judge Webster and Judge Ross himself) also joined in the original concurrence of Judge Ross. Pet. App. A-1, 550 F.2d at 400.

Judges Bright and Henley filed a dissenting opinion. Pet. App. A-1, 550 F.2d at 400. They found it

> anomalous to suggest that foreign sovereigns should enjoy the right to sue for treble damages when that right has not been granted to the United States. The *Cooper* Court stated, "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." [312 U.S.] at 604. Furthermore, the Court noted that "if the United States was intended to be included Congress would have so provided expressly." *Id.* at 607. We would apply this pronouncement here and exclude foreign governments as "persons" entitled to sue under the Clayton Act. Pet. App. A-2, 550 F.2d at 400.

The dissenters found no "evidence that Congress considered granting a foreign government the right to sue for treble damages" and noted that three of the six members of the majority had expressed the same view. Pet. App. A-2, 550 F.2d at 400.

Challenging the majority's conclusion that *Georgia* v. *Evans* could be used as a basis for imputing to Congress an intent to confer the treble damage right upon all "bodies politic," the dissenters observed that,

> If this conclusion rests upon Congressional intent, the analysis is tenuous at best. If this conclusion is bottomed upon reasoning that since *Evans* expanded the reach of the term "person," the definition of "person" should now be even further expanded, then the majority has adopted a questionable principle of statutory construction.
> Pet. App. A-3, 550 F.2d at 401.

In the view of the dissenting judges,

> The Judiciary ought not to add foreign governments to the "person" class without a clear Congressional intent to do so.
> Pet. App. A-2, 550 F.2d at 400.

SUMMARY OF ARGUMENT

The question for decision in these cases is whether, by the use of the phrase "any person" in section 4 of the Clayton Act and its predecessor, section 7 of the Sherman Act, Congress intended to confer upon foreign governments the right to sue for treble damages under the antitrust laws of the United States. The question is not whether foreign governments may be described as juristic persons, or whether they should be allowed to vindicate their rights in our courts. As this Court explained in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), "[t]he Sherman Act . . . created new rights and remedies which are available only to those on whom they are conferred by the Act." *Id.* at 604.

The court of appeals correctly recognized that the task of decision was to determine "the intent of Congress in passing the Act." Pet. App. B-3, 550 F.2d at 397. But it erred in concluding that, since a State of the Union is allowed to sue for treble damages, Congress must have "intended other bodies politic . . . to enjoy the same right." Pet. App. B-7, 550 F.2d at 399.

Georgia v. *Evans*, 316 U.S. 159 (1942), contained no suggestion that the Congress which enacted the Sherman Act had regarded all "bodies politic" as "persons." Indeed, upon enactment of the Revised Statutes in 1874, Congress had deleted "bodies politic" from the list of entities to which the term "person" might "extend and be applied" in federal statutes. Revised Statutes § 1, 18 Stat., pt. 1, at 1 (1874). It did so on the recommendation of the Commissioners for statutory revision, in order to eliminate an ambiguity and to ensure that, when used in subsequent federal statutes, "person" would not be extended to include "States, Territories, foreign governments, &c.," without special definition. *See* I REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note). And in 1876 this Court had confirmed the general rule that, when used in legislation, "person" did not include foreign or coordinate sovereigns unless extended by special definition. *United States* v. *Fox*, 94 U.S. 315, 321 (1876).

When Congress legislated against this background in 1890 it conferred the cause of action for treble damages only upon "persons," and it defined that term in section 8 of the Sherman Act to reach all business entities, "corporations and associations," that might do business upon American markets, but not sovereign governments.

In *United States* v. *Cooper Corp.* this Court confirmed the authority of the *Fox* case (*see* 312 U.S. at 604) and held that the Sherman Act's reference to "person" did not embrace a sovereign government such as that of the United States.

In *Georgia* v. *Evans* the Court also recognized the general rule that "person" is ordinarily construed to exclude sovereign governments, but held that this was not a " 'hard and fast rule of exclusion,' " and that, in view of the "legislative environment," the "purpose, the subject matter, the context, the legislative history," Congress must have intended to confer a federal antitrust remedy upon the States of the Union, even though it had not regarded the national government as a "person." 316 U.S. at 161. Since the requirements of our federal system limit the States' freedom to impose their own laws upon interstate commerce, it would have been anomalous to conclude that Congress had exercised the commerce power to enact comprehensive antitrust legislation without providing any remedy for the States. Indeed, a principal purpose for enactment of the federal antitrust law had been to supplement the protection afforded by state antitrust laws.

In extending *Georgia* v. *Evans* to hold that all "bodies politic" except the United States should be deemed "persons," the court of appeals applied an erroneous "hard and fast rule" of *in*clusion, which disregarded the very factors which *Georgia* v. *Evans* held determinative.

The "legislative environment" in which Congress wrote the Sherman law was characterized by a concern for the protection of domestic interests. While Congress exercised supreme power over interstate trade, it was well aware that its jurisdiction over international trade was only concurrent with that of other sovereign powers, and that such powers sought to regulate trade in accordance with their own economic interests and policies. Far from seeking to foster the commercial well-being of such powers, the Congresses which enacted the Sherman and Clayton laws regarded them as trading rivals, responsible for their own protection.

In view of the purpose of the antitrust laws to protect domestic consumers and competitors, Congress could have had no notion that the Judiciary might undertake to expand the meaning of "person" to include foreign governments.

The interests of foreign governments were not among those which Congress sought to protect, and this Court has held that, despite its usefulness as a deterrent, the treble damage remedy is indeed a remedy, reserved for redress of the kind of injury which Congress sought to prevent. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977).

It has been suggested that suits by foreign governments should nonetheless be allowed in order to supplement the federal government's enforcement capacity, so as to deter future violations. But it is improbable that Congress would have thought it appropriate to recruit foreign governments, most of which do not espouse our nation's antitrust principles, to assist the Executive Branch in enforcing our laws. Such an enforcement scheme should not now be embraced by judicial decision.

In conferring the treble damage remedy only upon "persons," Congress withheld that remedy from our own government. Foreign sovereigns will not respect our nation the less if they are remitted to their antitrust remedies against their suppliers under their own laws.

ARGUMENT

I.

THERE IS NO EVIDENCE WHATEVER THAT CONGRESS INTENDED TO CONFER THE CAUSE OF ACTION FOR TREBLE DAMAGES UPON FOREIGN GOVERNMENTS, AND IT LEGISLATED IN TERMS WHICH IT UNDERSTOOD TO EXCLUDE SUCH A RESULT.

A. The Legislative Environment Shows that Congress Sought to Ensure the Benefits of Free Competition for the People of the United States, Not to Extend Benefits to Foreign Countries.

The statutory provisions here at issue were first enacted by the Fifty-first Congress, as sections 7 and 8 of the Sherman Act.[5] Section 7 conferred the treble damage remedy only upon "persons," and "[t]he discussions of this section on the floor of the Senate indicate that [the treble damage remedy] was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 n.10 (1977). The essential purpose of the Act itself was to apply a remedy against "combinations which injuriously affect the interests of the United States." 21 Cong. Rec. 2456 (1890) (Sen. Sherman).[6]

5. Act of July 2, 1890, ch. 647, §§ 7 & 8, 26 Stat. 210. The provisions were again enacted, respectively, as sections 4 and 1 of the Clayton Act. Act of Oct. 15, 1914, ch. 323, §§ 1 & 4, 38 Stat. 730-31. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 610 (1941). Section 4 of the Clayton Act and section 7 of the Sherman Act were codified as a single section of the United States Code, 15 U.S.C. § 15. *See Georgia* v. *Evans*, 316 U.S. 159, 160 (1942). In 1955, section 7 of the Sherman Act was repealed as duplicative of section 4 of the Clayton Act. Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283. *See* S. Rep. No. 619, 84th Cong., 1st Sess. 2 (1955).

6. Those who favored passage of the Act intended it to benefit "the whole people whose interests are common." 21 Cong. Rec. 2727 (Sen. Edmunds); "the citizen," "our men and women," "the pockets of the poor," 20 Cong. Rec. 1457 (1889) (Sen. Jones); "unfortunate victims, the people of the United States," "our people," 21 Cong. Rec. 1768 (Sen. George); "the prosperity and welfare of the people," *id.* at 1771 (Sen. George); "the great mass of the people," *id.* at 2564 (Sen. Reagan); "the workingmen all over our land, . . . the farmers in their alliances," *id.* at 2569 (Sen. Sherman); "people . . . all over this broad land, the consumers . . ." *id.* at 2571 (Sen. Hiscock); "the sixty-five millions of people in the United States who use oil," *id.* (Sen. Teller).

As a spokesman for the Department of Justice recently affirmed,

> [T]he one clear purpose which does come through in the floor debates is a concern that United States consumers and small businessmen had been victimized by large and powerful trusts which organized themselves not only here but also abroad and which had controlled prices in our markets. There is not a shred of evidence that any of those who sponsored the Sherman Act intended it as a magna carta of competition for the benefit of foreign persons in foreign markets, to hold to account United States exporters engaged in restrictive practices in those markets.
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> Address by Douglas E. Rosenthal, Assistant Chief, Foreign Commerce Section, Antitrust Division, Department of Justice, to the American Society of International Law Annual Meeting (April 23, 1977).

The Fifty-first Congress enacted both the Sherman Law and the McKinley Tariff at the same session, and the Sherman Act's legislative history shows "an appreciation of the relationship between imports and domestic competition . . . ."[7] While we do not suggest that the McKinley Tariff and the Sherman Act should be construed in all respects *in*

7. K. Brewster, Antitrust and American Business Abroad 21 (1958). It was believed that while the tariff served to foster domestic industries, it also shielded them from foreign competition and thus helped to create the conditions in which domestic trusts might thrive. *See, e.g.*, 21 Cong. Rec. 1768 (1890) (remarks of Sen. George); *id.* at 4093 (Rep. Wilson). Senator Sherman had

pari materia (*see Erlenbaugh* v. *United States*, 409 U.S. 239, 243-44 (1972)), the two Acts were enacted at the same session of Congress, both contained the terms "person" and "foreign country," and both sought to protect related interests of the American economy[8]. Accordingly, the terms and policies of the two Acts should be given a consistent interpretation, as should the terms and policies of the Wilson Tariff Act of 1894, in which Congress again combined antitrust and tariff legislation. *See, e.g., United States* v. *American Building Maintenance Industries*, 422 U.S. 271, 277 (1975); *Federal Trade Commission* v. *Raladam Co.*, 283 U.S. 643, 647-48 (1931).[9]

"Person" was used in the McKinley Tariff Act solely to designate those who might be subject to criminal penalties or eligible for the domestic sugar bounty, and the Fifty-first Congress certainly could not have understood the term to include foreign countries in the context of that Act.[10]

originally conceived of his antitrust bill as based in part on the authority of Congress to impose tariffs on imports and to tax domestic goods which competed with imports. *See* 21 CONG. REC. 2598 (1890) (remarks of Sen. George); 20 CONG. REC. 169 (1888) (Sen. Reagan). At one stage Senator Sherman suggested that the tariff might be suspended in order to combat restraints of trade (*see* 21 CONG. REC. 2457 (1890)), but he receded from this position; and the Senate rejected such an amendment to the antitrust bill. 21 CONG. REC. 2661 (1890).

8. The McKinley Tariff sought to foster domestic industries and also placed sugar on the free list in order to destroy the "sugar trusts." *See* 21 CONG. REC. 5031 (Rep. Pickler); 21 CONG. REC. APP. 300 (1890) (Rep. Hermann) (McKinley Tariff "will destroy the most gigantic and merciless trust of the whole lot").

9. The Wilson Tariff Act was the Act of Aug. 27, 1894, ch. 349, 28 Stat. 509-70. Section 73 thereof, 15 U.S.C. § 8, provides a treble damage remedy for "persons" which is closely related to that of section 7 of the Sherman Act.

10. *See* McKinley Tariff Act, Act of Oct. 1, 1890, ch. 1244, § 1 (234)-(236), 26 Stat. 584 (sugar bounty); *id.* §§ 11, 12 & 20, 26 Stat. 614-16 (criminal penalties). "Foreign country" is referred to in sections 11 and 20, 26 Stat. 614-16, and "Government of any country" is referred to in section 3 of the Act, 26 Stat. 612.

The two Acts emerged from the same "legislative environment," and both reflected national economic policy. As Representative McKinley explained, some six weeks before final passage of the Sherman Act:

> We are not legislating for any nation but our own; for our people and for no other people are we charged with the duties of legislation. We say to our foreign brethren, "We will not interfere in your domestic legislation; we admonish you to keep your hands off of ours."
> 21 CONG. REC. 4253 (May 7, 1890).[11]

Both McKinley and Senator Sherman regarded the protection of domestic interests as paramount. Speaking with Sherman in Boston in 1888, McKinley had declared:

> Let England take care of herself, let France look after her interests, let Germany take care of her own people, but in God's name let Americans look after America![12]

Senator Sherman's speech on the same occasion reflected agreement:

> I am one of those unchristian men who believe the best we can do for mankind is to do the best we can for our country. I suppose that in Congress, at

11. The McKinley Tariff was extensively debated in the House of Representatives on May 7-10, 12-17, and 19-21. *See* 21 CONG. REC. 4246-5113 (1890) *(passim)*. The Sherman Act, as passed by the Senate, had been reported to the House on April 25, 1890 (*see* H.R. REP. No. 1707, 51st Cong., 1st Sess. (1890)), was amended and passed by the House on May 1, and was passed in its final form on June 20, 1890. *See* 21 CONG. REC. 4104, 6313.

12. Address by Rep. William McKinley, Home Market Club Banquet, Boston, Mass. (Feb. 9, 1888), *reprinted in* SPEECHES AND ADDRESSES OF WILLIAM MCKINLEY FROM HIS ELECTION TO CONGRESS TO THE PRESENT TIME 257 (1893).

> least, we are to legislate for the United States, and that on the question of home market or foreign market we are to be guided by the interests of the people of the United States.[13]

Although some in Congress argued that a protective tariff harmed the interests of domestic consumers, they did not challenge the fundamental principle that the object of all national economic legislation was to serve the interests of the United States, not foreign countries.[14] As Representative McKinley explained, "Here we are one country, one language, one allegiance, one standard of citizenship, one flag, one Constitution, one nation, one destiny. It is otherwise with foreign nations, each a separate organism, a distinct and independent political society organized for its own, to protect its own, and work out its own destiny." 19 CONG. REC. 4401 (1888).

The validity of the "economic judgment" of the Fifty-first Congress need not be endorsed by the courts; "but it is quite relevant in interpreting the language Congress chose." *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 208 (1968). In view of the related purposes of the tariff and the Sherman Act of 1890, and the legislative environment in which the two Acts were con-

13. Address by Senator Sherman, Home Market Club Banquet, Boston, Mass. (Feb. 9, 1888), *reprinted in pamphlet* "FREE RAW MATERIALS" EXPOSED 8 (1888). Senator Sherman had expressed the same view to the Senate. *See* 19 CONG. REC. 192 (1888).

14. *See, e.g.*, 21 CONG. REC. 4317 (1890) (Rep. Dockery) (low, not high, tariff would lead to "ultimate prosperity and grandeur of the American Republic"); *id.* at 4334 (Rep. Flower) ("Our object should be to promote every legitimate interest," not just manufacturing); *id.* at 4514 (Rep. Boatner) ("I approve entirely the policy which will give to American industries the American market" but protest the system "of adding to one man's prosperity at the expense of another").

ceived by the same Congress, it cannot be seriously contended that Congress would have thought it just or advantageous to extend the protection of the antitrust law to foreign governments, or that it would have wished to confer on them a treble damage remedy which it chose to withhold from our own government. *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941).

Congress never debated the question whether foreign governments should be granted a cause of action under the antitrust law because such a proposal was never made. The successive versions of the Sherman bill and the final draft prepared by the Senate Judiciary Committee were expressed in terms which Congress understood to preclude any such interpretation.

B. Congress Conferred the Cause Of Action For Treble Damages Only Upon "Persons," and It Understood that Term to Exclude Foreign Governments Unless Extended by Special Definition.

1. As Used in the Successive Drafts of the Sherman Bill, "Person" Meant Natural Person.

The six successive drafts of the Sherman bill would have conferred a cause of action for double damages upon any "person or corporation injured or damnified."[15] The use of the disjunctive, "person or corporation," suggested that "person" was used in its primary sense as meaning natural person. *See, e.g.*, BOUVIER'S LAW DICTIONARY 403 (1884 ed.). Senator Sherman described the damage remedy as "purely a personal remedy, a civil suit also by citizens of the United States." 21 CONG. REC. 2564 (1890). He sug-

15. For the text of the drafts, see 21 CONG. REC. 2597-2600 (1890) (reprinted to accompany speech of Sen. George).

gested that "men of spirit" would use it to combat the trusts. *Id.* at 2569.

The first four drafts of the Sherman bill also sought to impose liability upon "persons and corporations." After the argument was made that the antitrust bill exceeded the authority of Congress under the commerce clause, (*see* 21 Cong. Rec. 1768-72 (1890) (remarks of Sen. George)), Senator Sherman responded with a fifth draft, which purported to base the enactment upon the diversity jurisdiction of the federal courts under the Constitution, article III, section 2, and sought to impose liability upon combinations of "citizens or corporations" of diverse citizenship. *See* 21 Cong. Rec. 2455. In the course of debate it became apparent that introduction of a diversity requirement did not strengthen the jurisdictional basis of the bill (*see id.* 2463-65 (remarks of Sens. Sherman and Vest), 2556 (Sen. Turpie), 2567 (Sen. Hoar), 2600 (Sen. George)), and Senator Sherman agreed to base the act solely upon the commerce power. *Id.* at 2567, 2605, 2612-13.

The bill as it stood after elimination of the diversity clause forbade combinations "between two or more citizens or corporations." *Id.* at 2613. Senator Sherman then offered "one or two verbal amendments that I should like to have made." *Id* at 2639. One was to "strike out the word 'citizens' and insert the word 'persons'" in section 1. *Id.* This was agreed to. The purpose of the change was to ensure that liability under the Act would extend to all natural persons regardless of their citizenship.

2. *In Its Final Draft of the Bill, the Senate Judiciary Committee Used "Person" as a Defined Term Whose Scope Had Been Established By Statutory Revision and Judicial Construction.*

After the Sherman bill and the criminal provisions sponsored by Senator Reagan were adopted by the Senate in Committee of the Whole, the legislation was made "unwieldy" by addition of the Ingalls provisions, which would have imposed a prohibitive tax on speculative trading in numerous commodities. *See United States* v. *Wise*, 370 U.S. 405, 419 (1962) (Harlan, J., concurring). Senator George had argued that the Sherman bill exceeded the authority of Congress under the commerce clause and that the Senate Judiciary Committee, on which he served, should be allowed to redraft it. 21 Cong. Rec. 2600 (1890). The argument was renewed by Senator Hawley, who argued that the Judiciary Committee was "a body of veteran teachers and practicers of law [whom we have chosen] for the express purpose of getting the best advice possible, and we have not used our own machinery." *Id.* at 2660. After the Committee's chairman, Senator Edmunds, stated that he would have to oppose the Sherman bill as unconstitutional unless it was redrafted (*id.* at 2727-28), the Senate voted to refer the bill to the Committee. *Id.* at 2731.

As Senator Edmunds explained in The North American Review in 1911, the Judiciary Committee struck out the entire bill and reported a substitute, which was ultimately enacted by Congress without amendment.[16] The evidence indicates that Senator Edmunds himself was the principal draftsman of the Act and that Senator Hoar wrote section 7. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 n.10 (1940) (Senators Edmunds and Hoar "probably drafted

16. Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. Am. Rev. 801, 809, 811 (1911).

the bill").[17] The Committee's minute book shows that it took as its first order of business a resolution of the constitutional problem evoked on the floor by Senators George and Edmunds.[18] The Ingalls provisions were eliminated without recorded discussion, apparently on the ground that tax legislation must originate in the House of Representatives. *See* 21 CONG. REC. 2728 (remarks of Sen. Edmunds). In other respects, the work of the Committee has been described as a "general streamlining of the bill . . . with no intention of changing substance." *United States v. Wise*, 370 U.S. 405, 420 (1962) (Harlan, J., concurring).

In conferring the cause of action for treble damages only upon "persons," however, the Committee showed an awareness that "person" was a technical legal term, whose scope could be extended by special definition. And in section 8 of the bill the Committee did extend the term to include all "corporations and associations." As "veteran teachers and practicers of law," specially chosen to give the Senate the best legal advice possible, the Committee were undoubtedly aware that the question had already arisen whether the term "person" might include governments as well as corporations.

17. For the evidence as to authorship of the provisions of the Act, see M. BUMPHREY, AUTHORSHIP OF THE SHERMAN ANTI-TRUST LAW: REPORT OF AN INVESTIGATION OF THE OFFICIAL RECORDS (1912). The evidence indicates that Senator Edmunds drafted sections 1, 2, 3, 5 and 6, and that Senator Hoar was the author of section 7.

18. *See* MINUTE BOOK OF THE SENATE JUDICIARY COMMITTEE, March 31, 1890 (Manuscript in National Archives of the United States), *reprinted in* M. BUMPHREY, *supra* note 17, at 75-77. On motion of Senator Edmunds, the Committee unanimously agreed "that it is competent for Congress to pass laws preventing and punishing contracts, etc., in restraint of commerce between the States." Senator Edmunds then submitted drafts of sections 1 and 2 in which the constitutionally suspect language of Senator Sherman's bill was replaced by language from the Constitution itself. Thus, the law reflected and did not exceed the constitutional grant of power.

a. In the Statutory Revision of 1874, Congress Had Narrowed the General Definition of "Person" in Order to Ensure that it Did Not Extend to Foreign Governments.

Commissioners had been appointed in 1866 to revise and consolidate the federal statutes,[19] and in order to facilitate their task (*see* CONG. GLOBE, 41st Cong., 3d Sess. 776 (1871) (remarks of Sen. Trumbull)), Congress had enacted a general definitional statute in 1871, in which, as Mr. Justice Frankfurter stated, "Congress supplies its own dictionary."[20] As originally enacted, the statute had provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . ."[21] But in 1872 the Commissioners had reported to Congress that the definitional statute's reference to "bodies politic" was ambiguous, as it might be taken to include "States, Territories, foreign governments, &c." Therefore, the Commissioners had recommended that Congress delete "bodies politic" and provide simply that "person may extend and be applied to partnerships and corporations . . . ."[22]

19. *See* Act of June 27, 1866, ch. 140, 14 Stat. 74.

20. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947).

21. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

22. I REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note).

> The reasons for the . . . change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporation," it is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, &c., appear to be excluded.

Id.

Upon enactment of the Revised Statutes in 1874, Congress had adopted the recommendation, manifesting an intention that "person," when used in federal legislation, should not include "States, Territories, foreign governments, &c.," unless extended by special definition.[23]

Statutory annotations in current use when the Sherman Act was drafted pointed out that the general definition of "person" in the first section of the Revised Statutes was narrower than that contained in the earlier version of the statute, which had included "perhaps, in some cases, States, Territories, foreign governments, &c." 1 NOTES ON THE REVISED STATUTES OF THE UNITED STATES, 1874-1889 at 1 (J. Gould & G. Tucker eds. 1889).[24]

b. In the *Fox* Case in 1876, this Court Had Confirmed the Rule that "Person" Did Not Include Foreign or Coordinate Governments Unless Extended By Express Definition.

In 1876 this Court had also confirmed that "person" included artificial persons organized under the laws of the enacting state, but that, unless extended by special definition, it did not include coordinate governments.

> The term "person" as . . . used [in the New York statute governing the devise of real property] applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term "corporation" in the statute applies only to such corporations as are created under the laws of the State.
> *United States* v. *Fox*, 94 U.S. 315, 321 (1876).

23. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092 (Revised Statutes enacted into positive law). Although most of the Commissioners' substantive changes were deleted under the supervision of a joint committee of Congress (*see* 2 CONG. REC. 826 (1874) (remarks of Rep. Lawrence)), the revision of the definition of "person" was approved as a clarification of the intent of Congress, and it became a part of the very first section of the Revised Statutes as presented for enactment. *See* UNITED STATES REVISION OF THE LAWS 1 (Report of T. J. Durant, 1873).

24. For the present definition of "person," as further amended in 1948, see 1 U.S.C. § 1 (1970).

Although the case concerned New York legislation, this Court approved the principle of construction adopted by the New York court, and the opinion reflected general law. As the New York Court of Appeals stated, "no authority has been referred to showing that the word person, when used in a statute, may, without further definition, be held to embrace a State or nation. Its meaning may be extended by express definition so as to include a government or sovereignty." *In re Fox*, 52 N.Y. 530, 535 (1873), *aff'd sub nom. United States* v. *Fox*, 94 U.S. 315 (1876).

c. In Section 8 of the Sherman Act, Congress Chose Not to Extend the Definition of "Person" to Include Foreign Governments.

When the Senate Judiciary Committee drafted the Sherman law against this background in 1890, it chose to expand the meaning of "person" somewhat beyond that established by the definitional statute and the *Fox* case. Thus, the definitional statute provided that "'person' may extend and be applied to . . . corporations . . . unless the context shows that [the word] was intended to be used in a more limited sense" (Revised Statutes § 1), and the drafters of the Sherman Act removed any doubt in that regard by providing that, for purposes of the antitrust law, "person" "shall be deemed to include" corporations. Sherman Act, section 8. The drafters also extended the term to include "associations." *Id.* The *Fox* case had suggested that only artificial persons or corporations organized under the law of the enacting state might be deemed

included by a reference to "persons," and, in order to "preclude any narrow interpretation" (*see United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941)), the Committee enumerated the four kinds of corporations which do business in this country: those organized under the laws of "the United States, . . . the Territories, . . . any State, . . . any foreign country." Sherman Act, section 8.[25]

Congress was of course aware that foreign corporations and associations were often active in American markets, and it wanted to ensure that they competed in those markets on a basis of equality with domestic persons.[26] Therefore the Judiciary Committee specifically extended the definition to include "corporations and associations existing under . . . the laws of any foreign country." Sherman Act, section 8. Although the statute referred to "any foreign country" in that connection, it did not provide that such countries should be deemed "persons."[27]

25. *See, e.g.*, G. ENDLICH, INTERPRETATION OF STATUTES (1888 ed.).

> [I]t would seem . . . that, wherever corporations are embraced under the term persons, the corporations intended would be, at least, primarily, only those created under the laws of the state upon whose statute book the act appears, and generally, only private, not public or municipal ones.

Id. at 118-19 (footnotes, citing *Fox* and other cases, omitted).

26. *See, e.g.*, 21 CONG. REC. 4472 (1890) ("powerful foreign syndicates now rapidly purchasing and controlling" protected American industries) (Rep. McAdoo); 19 CONG. REC. 4409 (1888) ("The most oppressive trusts—oppressive to the American consumer—are those which deal in foreign goods") (Rep. McKinley, citing foreign plate-glass, china, tin, and iron trusts).

27. *See United States* v. *United Mine Workers*, 330 U.S. 258, 275 (1947) ("The absence of any comparable provision extending the term [person] to sovereign governments implies that Congress did not desire the term to extend to them"); *United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941). Under the usual rule of statutory construction, *expressio unius est exclusio alterius*, foreign countries would therefore be excluded. For a recent application of the rule, see *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In describing the final draft of the Sherman Act to the Senate, Senator Edmunds emphasized that the Judiciary Committee had made "its definitions out of terms that were well known to the law already . . .;" that it was a "bill that is clear in its terms, is definite in its definitions, and is broad in its comprehension . . . ." 21 CONG. REC. 3148 (1890). A subsequent account of Senator Edmunds' role in drafting the bill again emphasized the Committee's effort to use terms which had "a perfectly settled meaning in jurisprudence."[28] In view of the definitional revision of 1874 and this Court's decision in the *Fox* case, Congress was entitled to conclude that "person" was a term whose meaning was settled and that, unless extended by special definition, it did not include sovereign powers outside the jurisdiction of the United States.[29]

28. *See* Leupp, *The Father of the Anti-Trust Law*, THE OUTLOOK, September 30, 1911, at 273.

29. For further evidence of the effort to achieve certainty of definition, see Edmunds, *The Interstate Trust and Commerce Act of 1890*, 194 N. AM. REV. 801, 813 (1911), *quoted in Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 489 n.10 (1940).

> After most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific descriptions all the acts which should come within the meaning and purposes of the words "trade" and "commerce" or "trust," or the words "restraint" or "monopolize," by precise and all-inclusive definitions; and that these were truly matters for judicial consideration.
> *Id.*

"Restraint of trade" and "monopolize" were believed to have established meanings at common law. *See* 310 U.S. at 497; 36 CONG. REC. 522 (1903) (remarks of Sen. Hoar); 21 CONG. REC. 3151-52 (1890) (remarks of Sens. Hoar and Edmunds). Though well known to the public, the term "trust" lacked a common law meaning, and Senator Edmunds opposed its use, apparently for that reason. *See* Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 256 (1956). "Commerce" was a term from the Constitution itself, used to establish the jurisdictional basis for the enactment. *See Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc.* v. *United*

It cannot be supposed that, when the lawyers of the Senate Judiciary Committee set out to define "person," they were unaware of the leading Supreme Court case which had construed the scope of that term. Nor can it be presumed that the Committee were unaware of the ambiguity in the general definition of "person" which had been found by the Commissioners and eliminated by statutory revision in 1874.[30]

3. *In 1914 Congress Again Defined "Person" Exactly as It Had Done in the Sherman Act.*

The second commission to revise the statutes reported in 1909 that section 8 of the Sherman Act was an "amplification" of the definition of person contained in section 1

States, 286 U.S. 427, 434 (1932). While Congress intended the Judiciary to define "commerce" so as to reflect the full scope of congressional power (*see Hospital Bldg. Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 632-35 (1976) (Stewart, J., dissenting)), there can be no justification for expansion of the term "person" beyond the intent and understanding of Congress.

30. Senator Edmunds himself had been a member of the Judiciary Committee since 1867 and served as its chairman from 1873 to 1879 and from 1881 to 1891. HISTORY OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 1816-1967, S. MISC. DOC. No. 78, 90th Cong., 2d Sess. 132 (1968). In 1873 he had also served on the Senate Committee on the Revision of the Laws. *See* S. MISC. DOC. No. 7, 42d Cong., 3d Sess. 3 (1873). He was undoubtedly familiar with the final report which the Commissioners submitted to Congress when their term expired on May 4, 1873 (*see* Act of March 3, 1873, ch. 241, § 1, 17 Stat. 579), and with the reasons for the alteration in section 1, which was set forth on the very first page of the Revised Statutes as presented for enactment. Senator Hoar, then a member of the House of Representatives, also participated in debate on the Revised Statutes. *E.g.*, 2 CONG. REC. 647-48 (1874) (remarks of Rep. G. F. Hoar). He acted as speaker *pro tempore* during special evening sessions of the House devoted to the revision (*id.* at 819) and was present in that capacity when the Commissioners' definition of "vessel"—which appeared on the same page as their definition of "person"—was altered by vote of the House of Representatives. *See* 2 CONG. REC. 822.

of the Revised Statutes and that, "while the amplification is limited to the purpose of [the Sherman] act, it is believed that it may profitably be given a general application . . . ." FINAL REPORT OF THE COMMISSION TO REVISE AND CODIFY THE LAWS OF THE UNITED STATES 11 (1909) (Revisers' Note). Congress did not act upon the suggestion, but in 1914, when it defined "person" in section 1 of the Clayton Act, it used the definition of the Sherman Act, and it had every reason to suppose that the Commissioners approved that definition as consistent with the recommendation made in 1872, pursuant to which Congress had deleted the reference to "bodies politic."

Section 4 of the Clayton Act was a reaffirmation of the Sherman Act's section 7. It extended "the remedy under section 7 of the Sherman Act to persons injured . . . by the wrongful acts of persons or combinations violating any of the antitrust laws . . . ." H. R. REP. No. 627, 63d Cong., 2d Sess. 14 (1914). Congress indicated no intention to alter the meaning of the provision. *See United States* v. *Cooper Corp.*, 312 U.S. at 610. The legislative history indicates that the Sixty-third Congress understood the treble damage remedy to be available to "any citizen of the United States or denizen of the country who desires to take advantage of it." 51 CONG. REC. 13898 (1914) (Sen. Walsh).

C. The *Cooper* Case Confirmed the General Rule that "Person," As Used in Section 7 of the Sherman Act, Did Not Include Sovereign Governments.

In *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), this Court confirmed the authority of the *Fox* case as reflecting the usual rule of construction (*see* 312 U.S. at 604) and held that the United States, a sovereign government, was not itself a "person" entitled to sue for treble damages under the Sherman Act. Although the economic interests

of the United States were the same as those of American consumers, the class sought to be protected by the Act, the Court held that the language of the enactment did not confer a damage remedy upon the government and that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." 312 U.S. at 605.[31]

When Congress accorded the federal government a cause of action for single damages in 1955, it confirmed that the *Cooper* case had been correctly decided.[32] It withheld the treble damage remedy because it thought it "wholly improper" to give the domestic sovereign a monetary incentive to enforce the law (*see* S. REP. No. 619, 84th Cong., 1st Sess. 2 (1955)), and also "in view of the disastrous impact of triple damages upon concerns doing a large proportion of their business with the Government." H. R. REP. No. 422, 84th Cong., 1st Sess. 4 (1955). Although Attorney General Brownell advised Congress that a single damage remedy should be extended to the federal government since States and municipalities already possessed the right to sue for treble damages, he did not suggest that foreign governments could sue for treble damages.[33] Congress was entitled

31. In reaching its decision the Court found inapplicable a line of cases which suggested that, even when the domestic sovereign is not specifically provided for, a remedy may be implied for it in the "general words of a statute intended to prevent injury and wrong." *Nardone* v. *United States*, 302 U.S. 379, 384 (1937). *See, e.g., Dollar Sav. Bank* v. *United States*, 86 U.S. 227, 239 (1873). The statute left no room for implication of a simple compensatory remedy, such as that granted in *Wyandotte Transp. Co.* v. *United States*, 389 U.S. 191 (1967), because it had long been established that the remedies fixed by the Sherman Act are exclusive. *Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916).

32. Act of July 7, 1955, ch. 283, § 1, 69 Stat. 282 (codified at 15 U.S.C. § 15a (1970)).

33. Letter from Attorney General Herbert Brownell to Senator Harley M. Kilgore (June 16, 1955), *reprinted in* S. REP. No. 619, 84th Cong., 1st Sess. 7 (1955).

to conclude that, with the establishment of damage remedies for municipalities, the States, and finally the federal government, it had provided a remedy for all the governments which it saw fit to protect. *Cf. Zemel* v. *Rusk*, 381 U.S. 1 (1965); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953).

II.

CONSIDERATIONS OF FEDERALISM, WHICH JUSTIFIED EXTENSION OF THE TREBLE DAMAGE REMEDY TO THE STATES OF THE UNION, DO NOT JUSTIFY A FURTHER EXTENSION TO THE WORLD'S SOVEREIGN GOVERNMENTS.

The decision in *Georgia* v. *Evans*, 316 U.S. 159 (1942), should be regarded as an exception to the more general rule as to sovereign governments which this Court had applied in the *Cooper* case. In *Georgia* v. *Evans* the Court acknowledged the authority of that general rule, but held that Congress must have intended to create an exception in order to afford a remedy to the States of the Union. The exception was based on considerations which are peculiar to our federal system.

It had early been held that a city could sue for treble damages because it was a "municipal corporation" formed under State law. *See City of Atlanta* v. *Chattanooga Foundry & Pipeworks*, 127 F. 23, 25 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).[34] Congress had as good reason to protect the States as it did to protect municipal corporations, and, in *Georgia* v. *Evans*, the State of Georgia contended that "[i]f the word 'person' as used in the statute

34. *But see City of Kenosha* v. *Bruno*, 412 U.S. 507, 512-13 (1973) and *Monroe* v. *Pape*, 365 U.S. 167, 191 & n.50 (1961), holding that municipal corporations were not "persons" for purposes of the statute there at issue.

excludes the sovereign, the State may yet maintain an action," because it "has effectively divested itself of its sovereignty with reference to . . . interstate commerce . . . and is relegated to the status of a private individual." Brief for Appellant at 37, *Georgia* v. *Evans*, 316 U.S. 159 (1942). Upon ratification of the Constitution, the States had ceded to Congress their sovereign authority over interstate and foreign commerce, and Congress had assumed a corresponding obligation to exercise that power in the interest of the States and their inhabitants. It would have been anomalous to conclude that Congress had enacted comprehensive antitrust legislation but had chosen to leave the States without remedy thereunder.

Georgia's argument had support in the legislative history. A principal reason for enactment of the federal antitrust law had been that state laws, with their limited territorial jurisdiction, had proved ineffective to destroy economic combinations such as the sugar trust. 21 CONG. REC. 2459 (1890) (remarks of Sen. Sherman). It was quite clear that Congress intended the federal antitrust law to "supplement" that of the States. *See* 21 CONG. REC. 2457 (remarks of Sen. Sherman); H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890).

Moreover, in view of the division of power in our federal system, it appeared that if a State had no damage remedy as a "person" protected by the Sherman Act, then, at least in some circumstances, it might have no remedy whatever, not even a remedy under its own antitrust laws.

Thus, the House Judiciary Committee had reported in 1890 that "Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations." H.R. REP. No. 1707, 51st Cong., 1st Sess. 1 (1890). This Court had con-

firmed that view in 1895. *See United States* v. *E. C. Knight Co.*, 156 U.S. 1, 12 (1895) ("That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the State").

Even if the prohibition of the State's antitrust law were identical to that of the federal statute, this Court's decision in *Charleston & Western Carolina Railway* v. *Varnville Furniture Co.*, 237 U.S. 597 (1915), suggested that it would be unconstitutional to apply state law to interstate transactions in order to impose additional liabilities over and above those fixed by Congress.

> When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.
> 237 U.S. at 604.

A similar view was expressed in *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

When *Georgia* v. *Evans* was decided in 1942, the Court was well aware that decisions then recent had vastly expanded the scope of interstate commerce subject to the federal antitrust laws, but it still sought to draw a line between intrastate and interstate commerce. *See Parker* v. *Brown*, 317 U.S. 341, 363 (1943); *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).[35] The result suggested by authoritative cases,

35. Compare the views subsequently articulated in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 232 (1948) ("necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins"), and in *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1954) ("Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman Act cases"). *See also Wickard* v. *Filburn*, 317 U.S. 111 (1942).

preemption of a State's antitrust law as it affected interstate commerce, would have meant that a State's civil and criminal remedies under its own law had become applicable in an ever narrower area as the federal judiciary had expanded the scope of interstate commerce. Far from supplementing a State's antitrust protection, in some cases the federal enactment might have deprived the States of any remedy whatever.

As Mr. Justice Frankfurter stated for the Court in *Georgia* v. *Evans*, if the federal antitrust law were interpreted to afford the States no damage remedy, then "no remedy whatever [would be] open to a State when it is the immediate victim of a violation of the Sherman Law. . . . Such a construction would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State." 316 U.S. at 162-63.

Even if the States retained some freedom to apply their antitrust laws in respect of interstate transactions already subject to federal control, federal policy favored avoidance of potential conflict.[36]

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36. In a later case the Court suggested there was some room for concurrent regulation (*California* v. *Zook*, 336 U.S. 725, 729-31 (1949) (5-4 decision)), but Justice Frankfurter's dissent in that case sheds light upon his reasoning in *Georgia* v. *Evans*. He insisted that California could not impose additional sanctions upon interstate carriers for their failure to meet federal requirements:

> One would suppose that, when Congress has proscribed defined conduct and attached specific consequences to violations of such outlawry, the States were no longer free to impose additional or different consequences by making the same misconduct also a State offense. . . .
>
> For the first time in the hundred and twenty-five years since the problem of determining when State regulation has been displaced by federal enactment came before this Court, . . . the Court today decides that the States can impose an additional punishment for a federal offense unless Congress in so many words forbids the States to do it.

336 U.S. at 738-39. *See* Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961).

These "considerations of federalism" are inapplicable to foreign governments.[37] Unlike the States, foreign governments possess plenary power to regulate their exports and imports, and they do so in accordance with their own economic philosophies. They are free, if they wish, to enact their own antitrust laws.[38] Unlike the States, they may apply their laws to transactions in international trade with no need to observe the constraints of the Constitution. *Cf. Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951). They have yielded none of their sovereign powers to Congress, and Congress has assumed no obligation to regulate the trade practices of American exporters for their benefit. Congress expressed the intention that state and federal antitrust laws should supplement each other, but it expressed no similar concern for foreign countries.

III.

JUDICIAL EXTENSION OF THE TREBLE DAMAGE REMEDY TO FOREIGN GOVERNMENTS WOULD CONFLICT WITH THE POLICIES OF THE LAW.

Congress had good reason to grant the treble damage remedy to foreign corporations but to withhold it from foreign governments. While foreign corporations sought to do business and to acquire property in this country and thus might place themselves within the jurisdiction of the

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37. *See Israel-British Bank (London) Ltd.* v. *Federal Deposit Ins. Corp.*, 536 F.2d 509, 514 (2d Cir.), *cert. denied*, 97 S.Ct. 487 (1976) (reference to "banking corporations" held to mean only those organized under state or federal law, not foreign banking corporations).

38. As Senator Sherman said, "We give to foreign nations the light of our example, but our duty is to our own." 19 CONG. REC. 192 (1888). Respondents India and the Philippines have enacted antitrust legislation. *See* India Monopolies and Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972); PHILIPPINES REV. PENAL CODE art. 186 (1972).

United States, Congress was well aware that it could exercise little effective control over the policies and activities of sovereign governments. It was conceivable that such a government might undertake to engage in commercial activities in this country, but it would have seemed preferable that it do so in corporate form, thus divesting itself of any claim of sovereign privilege. *See Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922) ("The meaning of incorporation is that you have a person, and as a person one that presumably is subject to the general rules of law"); *Bank of the United States* v. *Planters' Bank*, 22 U.S. (9 Wheat.) 904, 907-08 (1824). It is not uncommon for corporations to possess rights which are denied to the foreign sovereigns which own their stock. *E.g., Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934) (corporation allowed to sue, although owned by unrecognized foreign government). Unlike the distinction between "commercial" and "governmental" activities, which has been described as a "quagmire" (*see Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (1955)), the test of sovereign or corporate status had the virtue of clarity of application, and it remains a sound basis of distinction in this and other contexts.

Thus, for purposes of the recently enacted section 7A of the Clayton Act,[39] the Federal Trade Commission has proposed regulations which provide that "'person' shall not include any foreign state, government, or agency thereof (other than a corporation engaged in commerce or in any activity affecting commerce)." 41 Fed. Reg. 55490 (1976). The Antitrust Division of the Department of Justice concurred in the definition.[40]

39. 15 U.S.C.A. § 18a (West Supp. 1977), *as added by* Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tit. II, § 201, 90 Stat. 1390.

40. *See* 15 U.S.C.A. § 18a(d)(2)(A) (West Supp. 1977); 41 Fed. Reg. 55488 (1976).

In the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 4(a), 90 Stat. 2894, Congress adopted the restrictive view of sovereign immunity, but it reaffirmed the distinction between sovereign governments and the "persons" who serve as their instrumentalities, since it provided that, even when acting in a commercial capacity, foreign sovereigns may not be held liable for "punitive damages," though their "agency or instrumentality" may be so liable. *Id.* (codified at 28 U.S.C.A. § 1606 (West Supp. 1977)). "Agency or instrumentality of a foreign state" is defined as "a separate legal person, corporate or otherwise." *Id.*, 90 Stat. 2892 (codified at 28 U.S.C.A. § 1603(b)(1) (West Supp. 1977)).[41]

There can be no contention that the term "person" should be broadened by judicial decision in order to effectuate any supposed purpose to protect the interests of foreign consumers or their sovereign governments.[42] The Sherman

41. Although the question whether foreign governments may ever be held liable under the antitrust laws is not presented in these cases, it is noteworthy that in 1890 Congress repeatedly characterized treble damages as a "penalty" (21 CONG. REC. 1765, 1767, 3146, 3147), "a punitory verdict" (*id.* at 4091), and it appears that even today Congress would decline to impose such damages upon foreign sovereigns. In any case, the 1976 enactment was "not intended to affect the substantive law of liability" under prior statutes. H.R. REP. No. 1487, 94th Cong., 2d Sess. 12 (1976); *see id.* at 22. The Sherman Act "gives no hint that it was intended to restrain state action or official action directed by a state." *Parker* v. *Brown*, 317 U.S. 341, 351 (1943). *See Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 78 n.14 (2d Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3692 (U.S. Apr. 19, 1977) (No. 76-1403) ("We agree that Libya cannot be guilty of a Sherman Act violation . . . because it is not a person or corporation within the terms of the Act but a sovereign state"). Also not presented in these cases is the question whether foreign countries are "persons" who may be barred from using the Panama Canal if adjudged in violation of the antitrust laws. *See* 15 U.S.C. § 31 (1970).

42. *See Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949); *United States* v. *Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818).

bill concerned itself with combinations which "advance the cost to the [domestic] consumer"; it referred to imports and to articles transported from one State to another, but not to exports, nor to goods transported from a State to a foreign country.[43] The language finally employed in the statute was taken from the Constitution itself, in order to ensure the constitutionality of the enactment (*see Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434 (1932)), not to extend the protection of the statute to the world's foreign nations.

This understanding was confirmed by the subsequent legislative history. In 1916, at the direction of Congress, the Federal Trade Commission reported its conclusion that Congress had not intended to forbid combinations in the export trade which exerted their effect upon foreign interests, and it recommended the enactment of "declaratory" legislation to confirm this view.[44] Congress responded by

43. For the successive drafts of the bill, see 21 CONG. REC. 2597-2600 (1890) (reprinted to accompany speech of Sen. George).

44. I FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE (1916):

> The Commission does not believe that Congress intended by the antitrust laws to prevent Americans from cooperating in export trade for the purpose of competing effectively with foreigners, where such cooperation does not restrain trade within the United States and where no attempt is made to hinder American competitors from securing their due share of the trade. It is not reasonable to suppose that Congress meant to obstruct the development of foreign commerce by forbidding the use in export trade of methods of organization which do not operate to the prejudice of the American public, are lawful in the countries where the trade is to be carried on, and are necessary if Americans are to meet competitors there on more nearly equal terms.

Id. at 9.

The Commission reported pursuant to section 6(h) of the Federal Trade Commission Act, Act of Sept. 26, 1914, ch. 311, § 6(h), 38 Stat. 722 (codified at 15 U.S.C. § 46(h) (1970)).

enacting the Webb-Pomerene Act,[45] which affirmatively established that the policy of Congress was to maximize the value of American exports.[46] Like the report of the Federal Trade Commission, the report of the House Judiciary Committee which accompanied the Webb-Pomerene bill emphasized that it was declaratory of the existing rights of American exporters.[47]

45. Act of Apr. 10, 1918, ch. 50, §§ 1-5, 40 Stat. 516-17 (codified at 15 U.S.C. §§ 61-65 (1970)).

46. As the Court stated in *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 207-208 (1968):

> The legislative history is even more explicit. During the hearings on the bill, one Congressman, Charles C. Carlin of Virginia, stated clearly what was later to be one of the dominant themes of the floor debate . . . .
>
> "I am frank to say that personally I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturers get the largest price possible, but if by indirection we are going to set up a system which is going to fix a higher price eventually at home, through a combination as suggested in this bill, I think you can very well see that such a system is a very dangerous one." Hearings before the House Committee on the Judiciary on H.R. 16707, 64th Cong., 1st Sess., 7 (1916).
>
> The same theme was reiterated on the floor by the Act's two main sponsors. Senator Pomerene said bluntly "[W]e have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States." 55 Cong. Rec. 2787 (1917). And Congressman Webb declared, "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 Cong. Rec. 3580 (1917).

47. H.R. REP. No. 50, 65th Cong., 1st Sess. (1917).

> The bill does not authorize any violation of the present antitrust laws. There are many great lawyers who think there is nothing in existing laws to prevent American manufacturers and exporters from combining in whatever manner they please in foreign countries to dispose of their products, but other lawyers take the position that there is doubt about this power,

Thus, throughout the period of the Sherman, the Wilson Tariff, the Clayton and the Webb-Pomerene Acts, Congress pursued an economic policy which distinguished sharply between foreign and domestic interests. It sought both to ensure free competitive conditions in this country and to foster the domestic economy in preference to the economies of foreign nations. Congress continues to pursue both goals.[48]

The Department of Justice has argued that the definition of "person" should be expanded to allow treble damage suits by foreign governments, as this might "supplement the federal government's limited enforcement capacity with private suits, so as to deter future violations." Memorandum of the United States as Amicus Curiae at 3. But this would sacrifice one policy of Congress in supposed furtherance of the other.

The argument also disregards the teaching of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690 (1977), that, despite its usefulness as a deterrent, the treble damage remedy is indeed "designed primarily as a remedy." *Id.* at 696. Punitive damages and an attorney's fee were authorized in order to ensure the effectiveness of the remedy, to counterbalance "the difficulty of maintaining a private suit against a combination such as is described." 21 Cong. Rec.

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and in order to absolutely clarify the situation and in common fairness to our American exporters we present this bill. The bill prohibits the slightest violation of our antitrust laws within the United States, but makes it clear that American exporters doing business in foreign countries are to be allowed to do business in those foreign countries according to the foreign laws.

Id. at 3. *See* K. Brewster, Antitrust and American Business Abroad 105-106 (1958).

48. *See, e.g.*, Balance of Payments Act of 1965, Act of Sept. 9, 1965, Pub. L. No. 89-175, § 1, 79 Stat. 672.

[I]t is declared to be the policy of Congress to safeguard the position of the United States with respect to its international balance of payments.

2456 (1890) (Sen. Sherman). Remedies, by definition, are reserved for redress of the kind of injury which it was the purpose of the statute to prevent.

Numerous cases have rejected the notion that the treble damage remedy should be expanded beyond the intention of Congress in order to achieve deterrent effect. As the Court observed in *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251 (1972), "[t]he lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Id.* at 263 n.14. *See, e.g., Reibert* v. *Atlantic Richfield Co.*, 471 F.2d 727, 731 (10th Cir), *cert. denied*, 411 U.S. 938 (1973) ("Appellant is not among those . . . which the prohibition of this type of violation was clearly intended to protect"). In such cases recovery was denied, even though enforcement of the treble damage remedy would have imposed added penalties upon transgressors of the antitrust laws. *See also Illinois Brick Co.* v. *Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977).

Even if treble damages were conceived solely as a means of enforcement, it is improbable that Congress would have wished to recruit foreign governments as "private attorneys general" to aid in enforcing our laws. Congress thought it "wholly improper" to give the United States a monetary incentive to enforce those laws (S. Rep. No. 619, 84th Cong., 1st Sess. 3 (1955)), and mercenary enforcement by foreign sovereigns, most of which do not share our antitrust principles, would have seemed even more distasteful. The Fifty-first Congress approved McKinley's admonition to foreign sovereigns: "'We will not interfere in your domestic legislation; and we admonish you to keep your hands off of ours.'" 21 Cong. Rec. 4253 (1890). Even the Ninety-fourth Congress, which enacted the Antitrust Improvement Act of 1976, saw no need to authorize suits by foreign

governments in behalf of their citizens, even though it invited such suits by the attorneys general of the States.[49]

Congress would also have thought it a bad bargain to exchange treble damages for such enforcement assistance as foreign governments might vouchsafe. Remote from our affairs, they are likely to complain of alleged restraints in our domestic markets only after the federal government or domestic plaintiffs have commenced proceedings, as in the instant cases. As pioneer litigants, they may claim treble damages in respect of their purchases of armaments or equipment, but such purchases, though they may occur on a vast scale, are likely to have little relationship to the restraints which harm domestic consumers. Congress feared "the disastrous impact of triple damages upon concerns doing a large proportion of their business with the Government" (H. R. Rep. No. 422, 84th Cong., 1st Sess. 4 (1955)), and the cumulative impact of treble recoveries by foreign governments could be equally severe.[50]

In establishing the treble damage remedy, Congress created a medicine for the domestic economy; but it also prescribed the dosage when it conferred that remedy only upon "persons," and limited even the domestic sovereign to single damages. If antitrust violators restrain their domestic competitors from dealing with foreign governments, such competitors may well have a cause of action and should be relied on to enforce it. *See Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1093 (1969). It is not

49. *See* Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, tit. III, § 301, 90 Stat. 1394-95 (codified at 15 U.S.C.A. § 15c (West. Supp. 1977)).

50. Unlike the usual case in which a foreign corporation recovers treble damages (*see Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); I.R.C. §§ 881, 882), a recovery by a foreign sovereign would be free of United States income tax. I.R.C. § 892. *See* Rev. Rul. 298, 1975-2 C.B. 290.

necessary to extend a cause of action to the world's foreign governments. The enforcement of the antitrust laws should be left to the federal government and to the "persons" Congress had in mind when it established the treble damage remedy.

CONCLUSION

The record of experience under the Sherman and Clayton Acts indicates that, for some three quarters of a century after enactment of the Sherman Law, it was assumed that foreign countries had no claim for treble damages. *Cf. In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 316 n.3 (S.D.N.Y. 1971)(A6). "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941). *Accord, United States* v. *Cooper Corp.*, 312 U.S. 600, 613-14 (1941). *See also Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356, 357 (1953).

The general rule applied by this Court is that the Judicial Branch should leave to Congress the decision whether to provide particular damage remedies. *E.g., Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972); *United States* v. *Gilman*, 347 U.S. 507, 511-13 (1954); *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 314-17 (1947); *see Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 206-11 (1976). The Judiciary should not create a cause of action that Congress did not intend.

The admonition as to judicial restraint is especially appropriate today when many of the world's foreign countries are arrayed in trade combinations which conflict with the philosophy of the antitrust laws, but which our govern-

ment has been substantially powerless to prevent. The Judicial Branch should not undertake to extend the cause of action for treble damages to foreign governments without allowing our own government to obtain something in return. If the decision is made to grant foreign countries the rights here at issue, it should be made by Congress.

Accordingly, for the reasons set forth above, the decision of the Court of Appeals should be reversed.

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July 1, 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY,

Petitioners,

— against —

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, AND THE REPUBLIC OF THE PHILIPPINES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

CITATIONS

Constitution and Statutes:

Other United States Statutes and Regulations Cited

Legislative History

Reports

Other Authorities

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OPINIONS BELOW

The opinions of the Court of Appeals and the relevant opinion of the District Court in these cases are reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") and in the separate Appendix ("App.") as set forth in the Joint Brief for Petitioners ("Pet. Br.").

JURISDICTION

The jurisdictional requisites are set forth adequately in the Joint Brief for Petitioners.

QUESTION PRESENTED

Whether a foreign government is a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970)?

STATUTORY PROVISIONS INVOLVED

The Clayton Act, Act of Oct. 15, 1914, ch. 323, 38 Stat. 730, as amended:

Section 4.

> That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
> 38 Stat. 731 (codified at 15 U.S.C. §15 (1970)).

Section 1.

> The word "person" or "persons" wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.
> 38 Stat. 730 (codified at 15 U.S.C. §12 (1970)).

STATEMENT OF THE CASE

The chronology of events contained in petitioners' statement of the case is essentially correct. As noted, the action of Vietnam, pending at the time of the Eighth Circuit decision has been dismissed. No. 77-1093 (8th Cir. June 15, 1977). Discussion of the District Court's opinion and a full discussion of the Eighth Circuit's opinion were omitted.

The Decision of the District Court

The question of a foreign government's standing to maintain suit first was raised in the Consolidated Broad Spectrum Antibiotics Actions in 1969, when the State of Kuwait filed a damage action in the U.S. District Court for the Southern District of New York. In ruling on petitioners' motion to dismiss the action for lack of standing, the District Court held that a foreign government is a "person" within the meaning of the antitrust laws:

> [T]he real question, as this Court perceives it, is whether the maintenance of this action is essential to the effective enforcement of the antitrust laws. The Court believes that it is and the motion will be denied.
> *In Re Antibiotic Antitrust Actions (State of Kuwait v. Chas. Pfizer & Co.)*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971), App. A-5.

The District Court applied its holding and the *ratio decidendi* in the *Kuwait* action in holding that the plaintiff-respondent governments were "persons" under Section 4 of the Clayton Act. Pet. App. C, D, E.

The Decision of the Eighth Circuit

In affirming the decision of the District Court, the Court of Appeals for the Eighth Circuit sitting *en banc* and adopting *per curiam* the earlier opinion of its original panel, stated:

In view of the holding in *Evans* that Congress intended domestic state governments to have standing to sue for treble damages under the antitrust laws, we conclude that Congress intended other bodies politic, such as a foreign government, to enjoy the same right. There is certainly no indication of a contrary intent in the legislative history. In contrast to *Cooper*, no other provisions of the Act support the contention that Congress intended to exclude foreign nations. We find that the district court correctly held that foreign nations are "persons" under §4 of the Act entitled to sue for treble damages.
Pet. App. B-7.

SUMMARY OF ARGUMENT

A fundamental principle of law adhered to since the inception of this nation is that foreign governments have access to the courts of the United States. This principle rests on basic concepts of comity between nations. Indeed, provision for access is made in the Constitution, Art. III, §2, Cl. 1, and is supported by a line of cases decided both before and after the passage of the Sherman and Clayton Acts. In *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870), the Court declared "[a] foreign sovereign, as well as any other foreign person . . . may prosecute [its civil cause of action] in our courts." *Id.* at 167. The United States also has availed itself of concommitant rights in the courts of other countries.

Only in the most extreme cases have sovereigns been denied access to the courts of the United States. As this Court noted:

> [W]e are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States Courts.

> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

The governing rule of statutory construction applied by this Court is that "[w]hen general rights are declared or remedies given by statute" a sovereign is presumed "to be included, though not named." BLACK, INTERPRETATION OF LAWS, 99 (2d ed. 1896); *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 228, 239 (1879). A state, foreign or domestic, otherwise would be placed in a position inferior to private suitors. To deny a foreign state access to pursue rights granted in the Sherman Act therefore would require an unequivocal expression of congressional intent. Not only is any such expression lacking in the language of Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), or in its legislative history, but the purpose of the Act and the context of its terms compel the conclusion that foreign countries have standing to sue under the antitrust laws.

In *Georgia v. Evans*, 316 U.S. 159 (1942), this Court recognized the right of government entities to be included as "persons" qualified to bring suit under the antitrust laws. The Court held that when states act solely as purchasers, they must have available the same civil remedies as are available to other commercial purchasers. Otherwise, a state would be denied "all redress . . . when mulcted by a violator of the Sherman Law, merely because it is a State." 316 U.S. at 163.

The principles necessitating this result in *Georgia* are as applicable to foreign governmental entities as they are to states. When foreign governments enter the U.S. market in a proprietary or commercial capacity, they are equally vulnerable to anticompetitive practices. Neither domestic states nor foreign governments are able to protect themselves adequately through the enactment of domestic legislation. As a practical matter, any such legislation would be ineffective in securing jurisdiction over individuals in the United States who are responsible for the injury. Even if jurisdiction could be obtained, difficulties in

obtaining evidence of violations originating in this country are likely to prove insurmountable. Finally, because the remedies of the United States antitrust laws are not, and were not intended to be, exclusive, the availability of a domestic remedy is immaterial.

For many products, lack of an alternative source of supply will require a foreign government to deal with sellers located in the United States. In these situations, the U.S.-based seller can retain control over the terms and conditions of sale. This control will compound the difficulties of attempting to apply remedies available only with reference to the law of the foreign purchaser. For vital products such as medicines, foreign governments may be compelled to make purchases from sellers whom they suspect of engaging in price fixing conspiracies.

Since the decision in *Georgia* indicates that government entities do qualify as persons, *United States v. Cooper Corp.*, 312 U.S. 600 (1941) cannot stand for the proposition that *no* government entity can proceed under the antitrust laws. Congress intended to exclude only the United States under Section 4 because the statutory scheme provided the United States government with alternative remedies and obligations. In explaining Section 2 of his bill (the predecessor of Section 4 of the Clayton Act), Senator Sherman stated that in view of these exclusive remedies, the United States was precluded from invoking the civil damage remedy.

> *It is the second [damages] section that gives the civil suit, and that is not to be prosecuted at all by the United States or by the officers of the United States.* The first section deals with the public injury to the people of the United States and there the suit is brought in the name of the United States to restrain, limit, and control such arrangements so far as they are illegal. *The second section gives a private remedy to every person injured.* It seems to me the two sections are as distinct from each other as possible.
> 21 CONG. REC. 2563 (1890) (emphasis added).

No other sovereign, foreign or domestic, could have been excluded under Senator Sherman's explanation because no other sovereign had access to these other remedies. Congress, therefore, intended that "every" injured party *except* the United States be afforded the remedy of civil damages.

Cooper turned upon the perceived obligation of the sovereign to enforce its own statutes within its own territories without reference to any added stimulus provided by the prospect of recovering damages. Foreign governments have no equivalent duty; indeed, they have no authority under which to enforce the statutes of the United States.

In both *Georgia* and *Cooper*, the Court gave specific guidance with respect to the factors to be utilized in determining whether a sovereign qualifies as a "person" under Section 4 of the Clayton Act. The primary aids cited by the Court are (i) the executive interpretation of the statutes, (ii) purpose and subject matter, (iii) legislative history, and (iv) context. Each dictates that foreign governments be permitted to sue.

(i) Interpretation by the executive branch has been supplied by the participation of the United States as *amicus curiae* in full support of the proposition that foreign states are persons with standing to maintain suit.

(ii) The statute has two principle objectives: to provide an adequate remedy for those injured in their business or property by violation of the antitrust laws; and to serve as a deterrent to violators by threat of remedial lawsuits. Both purposes would be subverted by exclusion of foreign government plaintiffs. As a remedial statute, the Clayton Act is to be construed broadly and not in a fashion which would frustrate its underlying objectives.

(iii) The legislative history establishes that the anti-competitive activities described in the Act were prohibited under the common law. Because these activities usually took place in interstate or foreign commerce rather than in a local setting, victims of those practices often lacked access to courts capable of supplying an adequate remedy. It was the intent of Congress to correct this situation by opening the federal courts to all who were injured. There is no indication that persons previously possessing common law rights were to be deprived of a remedy under the antitrust laws.

(iv) The context in which the term "person" appears in the Clayton Act further supports foreign government standing.

a. Section 1, 15 U.S.C. §12 (1970) is couched in inclusionary, not exclusionary, terms. The word "include" indicates that specific references following it are by way of example and not by way of limitation.

b. Corporations established under foreign law are explicitly covered within the definition of those "persons" whose interests are to be protected. It would be illogical to permit a government corporation recovery under the antitrust laws while denying recovery to the government itself. To make standing depend on whether a government enters the market in its own name or through the medium of a government-owned corporation would be a triumph of form over substance. It would penalize our allies and traditional trading partners while rewarding communist and socialist countries which purchase primarily through state trading corporations or other government corporations.

c. Section 4 uses the language "any person" to describe the essentially unlimited scope of rights being conferred. If Congress had intended to exclude a class of entities from the coverage of the Clayton Act, it could hardly have chosen two words more surely calculated to produce the very opposite impression.

d. The definition of "commerce" in Section 1 of the Clayton Act refers three times to commerce "with foreign nations." Congress evidenced an intent to protect such commerce. It would undermine this intent to read out of the statute that portion of foreign commerce attributable to foreign government purchases.

Petitioner-defendants' argument is based principally upon their assertion that the legislative climate — not the legislative history — shows a jingoistic proclivity on the part of some members of the 51st Congress to favor American interests over foreign interests. Petitioners glean this beggar-thy-neighbor attitude from speeches in political gatherings outside of the Congress and debates involving unrelated legislation. Pet. Br. at 11-13. The plain language of the antitrust acts belies this alleged legislative intent to provide an exclusively domestic remedy. The Acts expressly confer standing to sue on *foreign* corporations. It is not possible to reconcile Congress' action in including foreign purchasers in the definition of "person" with petitioners' assertion of a chauvinistic congressional intent to protect only domestic interests. Petitioners' corollary argument that the issue before this Court should be left to the future consideration of Congress is inapposite because foreign government standing comports with congressional intent.

Attempts to buttress the legislative environment argument with reference to the Statutory Revision of 1874 or the narrow holding of *United States v. Fox*, 94 U.S. 315 (1876), are equally unavailing. The 1874 Revised Statute was not intended by Congress to change the prevailing presumption that sovereign entities were included within the word "person" unless expressly excluded. A member of the law revision committee emphasized that Congress did not intend to make "any changes in existing law." 2 CONG. REC. 820 (1874) (remarks of Rep. E. R. Hoar).

Fox did not pronounce an exclusionary rule of general applicability, nor did it state a rule of law in New York that sovereigns were not "persons" within the definition of that term. To the contrary, cases both before and after *Fox*, including one case decided the year before the Sherman Act was enacted, *Republic of Honduras v. Soto*, 112 N.Y. 310, 19 N.E. 845 (1889), held that foreign sovereigns were within a general definition of "person." In fact, this Court's decision in *Stanley v. Schwalby*, 147 U.S. 508 (1893), flatly contradicts petitioners' contention that the *Fox* case "reflected general law." Pet. Br. at 21.

An inclusionary interpretation protects domestic consumers and producers. To deprive foreign states of a remedy would undermine "the effective enforcement of the antitrust laws," leaving unchecked conspiracies in foreign sales that "would certainly have an adverse effect on domestic commerce." *In re Antibiotic Antitrust Actions*, App. at A-7, 8.

To deny standing to foreign governments would be to class them as the *only* category of purchasers unable to recover for antitrust violations perpetrated within the United States. So unfair a result would be an embarrassment to the relations between foreign governments and the United States.

ARGUMENT

I. IN *GEORGIA V. EVANS*, THE COURT AFFIRMED THAT GOVERNMENT ENTITIES ARE PERSONS UNDER SECTION 4 OF THE CLAYTON ACT. THE SAME CONSIDERATIONS THAT APPLIED TO STATES IN *GEORGIA* APPLY TO FOREIGN GOVERNMENTS.

A. Like Domestic States And Other Commercial Purchasers, Foreign Governments Lack Adequate Means of Redress for Anticompetitive Activities In The United States, Except For That Provided By The Clayton Act.

In *Georgia v. Evans*, 316 U.S. 159 (1942), this Court held that a state had standing to sue under the Clayton Act. In finding that a government entity was a "person", the Court recognized that if a government is unable to apply sovereign power to prevent being victimized it becomes a mere "purchaser of commodities shipped in interstate commerce." *Id.* at 162. Recognizing that the remedies of injunction, seizure and criminal sanctions were made available only to the United States, the Court found that a state would be deprived of any effective remedy when mulcted by a violator of the antitrust laws unless it were able to apply the remedies granted persons. As a commercial purchaser, the foreign state is in the same predicament as a domestic state that purchases goods moving in the interstate or foreign commerce of the United States. Neither is able to assert any special prerogatives of its sovereign power to prevent commercial abuses.[1]

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[1] At the time the Sherman Act was passed, it was a settled rule of law that:

> Statutes derive their force from the authority of the legislature which enacts them. . . . It is only within these

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> In their commercial capacity, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens.
> *Alfred Dunhill, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976).[2]

This principle has its antecedents in root cases decided at least as early as 1824.[3]

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> boundaries that the legislature is lawmaker, that its laws govern people, that they operate of their own vigor upon any subject. No other laws have effect there as statutes.
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> J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION §12 at 11 (1st ed. 1891).

[2]The principle that a foreign country which enters the commercial market is to be treated as any other commercial party has been codified in the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2894. Under the Act, a foreign state can be sued when it undertakes commercial activity having an impact in the United States. It would be unfair to deny a foreign state the right to sue when it is injured, while subjecting that same state to suit as a defendant when it undertakes such commercial activity. The latter is more than a theoretical risk. Since passage of the Act, the NLRB held federal labor laws applicable to a government corporation of respondent India. *State Bank of India and Chicago Joint Board, AC & TWU, AFL-CIO*, 229 NLRB No. 137 (May 20, 1977). Similarly, the SEC obtained consent order jurisdiction over Pertamina, Indonesia's wholly-owned government oil company. *SEC v. Indonesian Enterprises, Inc.*, Civ. Action No. 77 Civ. 499 (S.D.N.Y. 1977).

[3]*Bank of United States v. Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824). And in *Ohio v. Helvering*, 292 U.S. 360, 369 (1934), this Court said: "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader. . . ."

While older cases applied the now discarded absolute theory of sovereign immunity to foreign governments as defendants, the sovereign's right of access as plaintiff has been recognized consistently.

Petitioners, however, have asserted that, unlike states, foreign governments are able to protect themselves against anticompetitive practices that take place outside the limit of their sovereignty through the enactment of domestic legislation.[4] Pet. Br. at 31. This assertion is incorrect from a practical and a jurisdictional viewpoint.

As a practical matter, foreign governments may have no alternative but to purchase from sources in the United States because they lack any realistic substitute source for the required goods or services. Thus, foreign purchasers, of necessity, may be forced to purchase essential commodities from sellers engaged in violation of United States antitrust laws. When this occurs, a foreign government's domestic legislation designed to insure that purchases are made in a competitive manner will be ineffective.[5]

Personal jurisdiction by foreign states over conspirators who need never leave the United States would be difficult, if not impossible, to acquire. Even if jurisdiction could be obtained, problems associated with obtaining evidence necessary to prosecute the action and with the production

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[4]Petitioners point out that some foreign governments have their own antitrust laws and thus have or could have some type of remedy. Pet. Br. at 31. States also have their own antitrust laws; and some had them at the time the *Georgia* decision was rendered in 1942.

[5]The practical and jurisdictional difficulties of obtaining redress by reference to local foreign laws is illustrated by a March 1965 letter from Mr. Amerding, a Pfizer executive, to all Pfizer Country Managers pointing out that:

> [T]he logical place to exert pressure is the country in which the supplier of the original material is located, and it is interesting that these are precisely the countries (with the exception of Italy) where our patent position is most effective. Appendix at A-153.

Moreover, price fixing on foreign government tenders and foreign territorial allocations can take place without the principal actors ever leaving corporate headquarters in the United States. *See, e.g.*, App. at A-158-167 (price fixing); App. at A-152 (territorial allocation); App. at A-173-176 (customer and product allocations).

of witnesses at trial abroad would be close to insurmountable. Finally, any remedies abroad — assuming jurisdictional and trial difficulties could be overcome — would be limited.[6] Injunctions issued by foreign sovereign courts would be difficult to enforce against American-based monopolists who maintain no presence in the foreign country.

B. The Decision In *United States v. Cooper Corp.* Is Supported By Express Congressional Intent To Exclude Only The United States From The Remedy Provided In Section 4.

The decision in *United States v. Cooper Corp.* 312 U.S. 600 (1941), recognizes a unique exception to the general rule that all commercial purchasers be afforded a remedy when damaged by an antitrust violation. This exception was deliberate and was discussed with great particularity by Senator Sherman in the floor debates relating to the Sherman Act. He noted that the United States was excluded from Section 2, the civil damage section,[7] (which later

[6]Foreign judgments could be satisfied by payment in local and frequently inconvertible currencies. The governmental purchaser, however, may have had to relinquish scarce foreign exchange at the time of purchase if the U.S. seller demanded payment in dollars. The receipt of damages in local currency would not remedy the loss of dollars in this situation.

[7]The civil damages section in the bill referred to by Senator Sherman was virtually identical to Section 4 of the Clayton Act, except that it then provided for double instead of treble damages. It read:

> That any person or corporation injured or damnified by such arrangement, contract, agreement, trust, or combination defined in the first section of this act may sue for and recover, in any court of the United States of competent jurisdiction, without respect to the amount involved, of any person or corporation a party to a combination described in the first section of this act, twice the amount of damages

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became Section 4 of the Clayton Act) since the United States had alternative remedies under another section of the bill. 21 CONG. REC. 2563 (1890). The United States was limited to the remedies provided under the section which dealt "with the public injury to the people of the United States." *Id.* Even though the civil damages section was "not to be prosecuted at all by the United States," Senator Sherman declared that this section gave a private remedy to "every person" injured. *Id.* This could mean *only* that *all* persons, including every foreign and domestic state purchasing in its proprietary capacity, except the United States, had standing to invoke the civil damages section.[8]

The wisdom or desirability of excluding the United States from the damage provision of the antitrust laws has been questioned, but there is no doubt that it was intentional. Moreover, the decision to exclude the United States could be rationalized since the government had the duty to maintain confidence in its statutory system by bringing actions to prevent violations without regard to remedial compensation.[9] This obligation, however, applies to the United States, and the United States *alone*.

In *Georgia*, this Court further distinguished the result in *Cooper*, noting that Congress withheld the damage remedy because "the United States has chosen for itself three [other] potent weapons for enforcing the Act . . . ." 316 U.S. at 161. The United States, therefore, was able to utilize its sovereign power for self-protection. Possessing no similar

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> sustained and the costs of the suit, together with a reasonable attorney's fee.

21 CONG. REC. 2563 (1890) (remarks of Senator Sherman).

[8]At the time it rendered its decision in *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court was well aware of the legislative mandate since Senator Sherman's statement was quoted in the brief of respondent, Cooper Corp. Brief for Respondent at 24-25.

[9]*See, e.g.*, S. R. REP. NO. 619, 84th Cong., 1st Sess. (1955).

arsenal of weapons, domestic and foreign states were never intended to, and do not, come within the exception created in the case of the United States.

II. THE AIDS GIVEN BY THIS COURT FOR CONSTRUING "PERSON" REQUIRE AN INCLUSIVE INTERPRETATION.

In *Georgia*, the Court enunciated criteria to be employed in determining the intent of Congress in the use of the term "person" in Section 4 of the Clayton Act.

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state *or nation* within the scope of the law. 312 U.S. at 604-605.
> 316 U.S. at 161 (emphasis added).

The specific reference to bringing a "nation" within the scope of the law suggests again that the *Georgia* decision contemplated standing for foriegn countries. Defendants are mistaken in attempting to limit the *Georgia* decision solely to domestic states.

A. Executive Interpretation Of The Statute Supports Standing.

The aid of executive interpretation has been provided through the appearance, *amicus curiae*, after consultation with the Department of State, of the Department of Justice in support of the right of foreign governments to maintain remedial damage actions because they are "persons" within the intended coverage of the Act.

B. The Context In Which The Word "Person" Appears In The Antitrust Laws Supports Foreign Government Standing.

1. Section 1 Is Inclusive Rather Than Restrictive in Character.

The definition of "person" in Section 1 provides that the defined term "shall be deemed to include" certain legal entities. These are the words of inclusion, *not* exclusion. They convey the meaning that there are other entities encompassed by the definition, although not specifically enumerated. As this Court stated in *Federal Land Bank v. Bismark Co.*, 314 U.S. 95 (1941):[10]

> [T]he term "including" is not one of all-embracing definition, but connotes simply an illustrative application of the general principle. 314 U.S. at 99-100.

2. Denial of Standing to Foreign Governments While Permitting Foreign Corporations Owned in Whole or in Part by the Governments to Maintain Suit Would Create an Unjustified Anomaly.

The definition of "person" in the Clayton Act expressly includes "corporations . . . existing under . . . the laws of any foreign country." Neither the Act nor its legislative

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[10] *California v. United States*, 320 U.S. 577 (1944), concerned the definition of "person" under the Shipping Act of 1916, 46 U.S.C. §801, which parallels the definition of "person" under Section 1 of the Clayton Act. The question was whether a state and a city were included within the definition:

> We need not waste time on useless generalities about the statutory construction in order to conclude that entities other than technical corporations, partnerships and associations are 'included' among the 'persons' to whom the Shipping Act applies . . .
> 320 U.S. at 585.

history excludes from this definition foreign corporations owned in whole or in part by a foreign sovereign. Thus, to the extent that the purchases of antibiotics involved in this case had been made by plaintiffs through government owned corporate entities, rather than through agencies or departments of the government, plaintiffs unquestionably would have a remedy.

It is not sound law to conclude that the protection of the antitrust laws should extend to a foreign state purchasing an item through a corporation owned by that state, but should not extend to the same state, purchasing the same item, on the same terms, through an unincorporated agency or department.[11] The decision to procure either through a corporate or non-corporate entity is only a matter of the foreign government's own administrative convenience.[12] It logically should have no legal relevance to the rights of that government under our antitrust laws.[13]

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[11]If it were held that only procurement by a foreign sovereign through a corporate entity were entitled to the protection of the antitrust laws, illogical consequences would ensue: for example, if manufacturers of jet aircraft conspired to fix the prices of planes sold to the British Royal Air Force [RAF] and to British Airways [BA], the RAF, as an agency of the British Government, would have no remedy, but BA, being a government owned corporation, could recover damages.

[12]In *Inland Waterways Corp. v. Young*, 309 U.S. 517 (1940), the Court noted:

> So far as the powers of a national bank to pledge its assets are concerned, the form which the Government takes — whether it appears as the Secretary of the Treasury, the Secretary of War, or the Inland Waterways Corporation — is wholly immaterial. The motives which lead Government to clothe its activities in corporate form are entirely unrelated to the problem of safeguarding governmental deposits, and therefore irrelevant to the issue of *ultra vires*. *Id.* at 523.

[13]The attempt to reconcile the anomaly by arguing that a foreign corporation owned by the sovereign is *not* a "person" finds no support

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Drawing a legal distinction between purchases by a sovereign made through a corporate as opposed to a non-corporate entity would reward communist bloc countries since they traditionally make their purchases through state trading corporations, and would penalize our Western allies since they usually purchase directly.[14]

Petitioners argue that there is precedent for distinguishing between acts of a foreign government and a foreign corporation owned by that government, citing Section 4(a) of the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, §4(a), 90 Stat. 2894. The Act, however, draws absolutely no distinction between a foreign government and a foreign corporation with respect to its underlying purpose — immunity from suit. Section 4(a) merely provides that the sovereign is not subject to punitive damages.

3. Congress Evidenced a Specific Concern With Foreign Commerce and Foreign Nations In the Language of the Sherman Act.

The term "foreign nations" is used repeatedly in the Sherman and Clayton Acts to describe the foreign com-

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either in the text of the Act or in its legislative history. It also creates a legal morass; the courts in every case would be required to determine what percentage of ownership or what elements of control make the corporation the legal equivalent of the foreign sovereign for purposes of Section 4. If a mechanical rule of 51% government ownership were adopted illogical distinctions would emerge: Japan Air Lines (44.34% government owned) would be a "person" but Air France (70% government owned) would not be; Alfa Romeo (49%) would be, but Renault (89.6%) would not be.

[14]S. PISAR, COEXISTENCE & COMMERCE, 141, 142 (1970); *cf. Amtorg Trading Corp. v. United States*, 71 F.2d 524, 528-529 (C.C.P.A. 1934).

merce which the antitrust laws seek to protect.[15] The Eighth Circuit observed that:

> When Congress enacted the antitrust laws, it expressly recognized that illegal contracts, conspiracies and monopolies by domestic firms may affect commerce with other nations.
> Pet. App. B-7.

This recognition is inconsistent with any suggestion that Congress would except foreign states from the class of persons accorded a right of action under Section 4. To do so would undermine the effectiveness of the antitrust laws in an area that Congress deemed essential to protect.[16]

4. The Reference in Section 4 of the Clayton Act to the Extension of the Remedy to "Any Person" Is Inconsistent With an Intent by Congress to Deprive Foreign Governments of a Remedy.

Section 4 extends the damage remedy to "any person". The comprehensive meaning intended by Congress in its use of the word "any" is evidenced by Senator Sherman's

[15] As noted by the Eighth Circuit, Pet. App. B-7 n.7, Section 1 of the Sherman Act declares illegal contracts, combinations or conspiracies "in restraint of trade or commerce . . . with foreign *nations*." Act of July 2, 1890, ch. 647, §1, 26 Stat. 209 (emphasis added). Similarly, Section 2 proscribes monopolizing and conspiring and attempting to monopolize commerce "with foreign *nations*." (emphasis added). Section 1 of the Clayton Act expressly refers three times to commerce "with foreign *nations*" in the definition of the term "commerce." Act of October 15, 1914, ch. 323, §1, 38 Stat. 730 (emphasis added).

[16] Senator Hoar said that the "great thing that this bill does" is to protect the "international and interstate commerce" of the United States. 21 CONG. REC. 3152 (1890). As author of the final version of Section 7 of the Sherman Act he emphasized that Congress had "af-

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statement that "every person injured" was to have a remedy. 21 CONG. REC. 2563 (1890). Senator Davis said that a "universal right of action" was being enacted. 21 CONG. REC. 2612 (1890). Petitioners, nevertheless, have argued that Congress legislated in terms which it understood to exclude foreign governments as entities privileged to maintain suit. Pet. Br. at 10. The legislators' use of such expansive language to describe those who may seek redress negates petitioners' assertion. Congress did not state that the Act applied to any person except for certain classes or categories of purchasers.[17] The term "any person" is written without restriction and, in the absence of any limitation, the Court should not impose one.[18]

[16] (continued)
firmed the old doctrine of the common law in regard to *all* interstate and international commercial transactions." 21 CONG. REC. 3146 (1890) (emphasis added) (remarks of Senator Hoar). Senator Sherman wanted to attack all unlawful combinations which "interfere with our foreign . . . commerce." 21 CONG. REC. 2456 (1890).

[17] The specific intent of Congress not to include the United States was discussed in Section I(B), *supra*.

[18] Exemptions from the antitrust laws will not be found by implication, but must be stated expressly by Congress. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). Even express exemptions will be construed narrowly so as not to limit or repeal the scope of the antitrust laws more than is absolutely necessary. *Carnation Milk Co. v. Pacific Westbound Conference*, 383 U.S. 213, 217-18 (1966). *See United States v. American Trucking Ass'n.*, 310 U.S. 534, 543 (1940):

> Even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed the purpose rather than the literal words.

C. The Subject Matter and Purpose Of The Antitrust Laws Support Standing.

An inclusive interpretation is required to implement the broad scope of the law intended by Congress which "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements." *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944). This Court has noted that:

> As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape.
> *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933).

In *D.R. Wilder Manufacturing Co. v. Corn Products Refining Co.*, 236 U.S. 165 (1915), the Court declared that the remedies provided to enforce these "broad conceptions of public policy" were to be "co-extensive" with them. *Id.* at 174. Accordingly:

> The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . . [It protects] *all* who are made victims of the forbidden practice by whomever they may be perpetrated.
> *Mondeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (emphasis added).

1. The Remedial Nature of Section 4 Requires a Liberal Construction Which Would Include Foreign States.

Section 4 is a remedial provision.[19] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 696 (1977); *City of Atlanta v. Chattanooga Foundry & Pipe Co.*, 101 F. 900, 906 (E.D. Tenn. 1900), *rev'd on other grounds*, 127 F. 23 (6th Cir. 1903), *aff'd.*, 203 U.S. 390 (1906). Remedial statutes "should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Westinghouse Electric Corp. v. Pacific Gas and Electric Co.*, 326 F.2d 575 (9th Cir. 1964),[20] *quoting Scarborough v. Atlantic Coast Line R.R. Co.*, 178 F.2d 253, 258 (4th Cir. 1949). A construction which restricts the application of Section 4 in the case of only one important class of direct purchaser is incompatible with its remedial character.

2. To Deny Standing to Foreign States Would Weaken the Deterrent Value of The Law.

A principle purpose of the antitrust laws is to deter anticompetitive conduct. The threat of treble damages has been recognized as an effective means of discouraging violations. In *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), this Court stated:

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an

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[19] To quote Senator Sherman:

> Now Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies . . . .
> 21 CONG. REC. 2461 (1890).

[20] "How is such a law to be construed? Liberally, with a view to promote its objects." 21 CONG. REC. 2461 (1890) (remarks of Senator Sherman).

> ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.
> *Id.* at 139.

In the recent case of *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977), the Court noted that Section 4 "is also designed to compensate victims of antitrust violations for their injuries," and "so long as someone redresses the violation" enforcement of the Act would not be weakened. *Id.* at 2075. In the case of foreign government direct purchases, denial of standing would mean that there would be no one to redress the violations.

Sellers would be tempted to fix prices in foreign government tenders if conspiracies were immunized from damage actions. But when Congress has determined that U.S. firms should be immunized from the reach of the antitrust laws viz-a-viz foreign interests, it has said so in explicit terms, and has granted limited immunity subject to carefully specified pre-conditions.[21]

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[21] *See, e.g.*, The Export Trade Act of 1918, 15 U.S.C. §§61 *et seq.* [Webb-Pomerene Act]. Among other requirements, those companies wishing to take advantage of the Act must register with the Federal Trade Commission. Petitioners erroneously contend that the Webb-Pomerene Act confirms a congressional intent in the Sherman Act not to protect foreign consumers or their sovereign government. As noted above, the grant of limited immunity demonstrates a strict control over any departure from the Sherman Act's broad remedial purpose. Whatever Congress' purpose in passing the Webb-Pomerene Act, it can form no relevant basis for determining the intent of Congress some 28 years earlier in passing the Sherman Act. This Court often has observed that it is unsound to rely on subsequent legislation or its legislative history in interpreting a prior statute. *See, e.g., NLRB v. Lion Oil Co.*, 352 U.S. 282, 291 (1957); *Higgins v. Smith*, 308 U.S. 473, 479-80 (1940).

D. The Legislative History of the Antitrust Laws Supports Inclusion.

During the debates which surrounded the passage of the Sherman Act, its sponsors declared that the bill "does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 CONG. REC. 2456 (1890) (remarks of Senator Sherman); 21 CONG. REC. 3146, 3152 (1890) (remarks of Senator Hoar). Congress recognized that the limited jurisdiction of the state courts would not permit those victimized to reach all miscreants engaged in anticompetitive practices.

In early versions of the Sherman bill, the jurisdiction of the federal courts was added to the jurisdiction which state courts had under the common law. Thus, in commenting on the bill at that time, Senator Edmunds was able to say that the law "gives in the circuit court of the United States the right of anybody to sue who chooses to sue" without depriving him of his alternative remedy "to use in the State courts." 21 CONG. REC. 3148 (1890). Congress sought to supply an alternative forum for those who did not have an adequate forum under the common law; no restriction as to the class of persons entitled to sue at common law was intended.

The constitutionality of opening the federal courts was a significant concern at the time the Sherman bill was introduced. After much debate, Congress concluded, however, that the bill was authorized by the commerce and judicial articles of the Constitution. Senator Sherman noted that the judicial article specifically covers disputes between citizens of the United States and "foreign states, citizens or subjects." 21 CONG. REC. 2460 (1890).

Against this background, it seems apparent that opening the doors of the federal courts was not intended to deprive

foreign states or any other person of their pre-existing common law rights.

1. In 1890, It Was Settled Law That the Word "Person" Appearing in a Statute Granting a New Remedy Presumptively Included Bodies Politic.

Congress' adherence to common law principles as to the wrongs prohibited by the Sherman Act was paralleled by its adherence to terms which "were well known to the law already." 21 CONG. REC. 3148 (1890) (remarks of Senator Edmunds). In 1890, the canons of statutory construction and accepted usage compel the conclusion that the word "person," when used in a statute without further definition, embraced both foreign and domestic states. Thus, contrary to respondents' contention, members of the Judiciary Committee of the 51st Congress in using the word "person" must have been aware that historically the term included sovereign entities.[22]

[22]Petitioners argue that as used in successive drafts of the Sherman Act, "person" meant natural person. They seize on the substitution of "persons" for "citizens" in the final draft of Section 1, which defined types of anticompetitive conduct and provided for suit by the United States. Pet. Br. at 15-16. However, the use of the term "persons" in Section 2 of the Bill, which conferred the private damage action remedy, remained constant through the successive drafts. Senator Sherman stated that "this provision allowing *any party* to sue is of vital importance." 21 CONG. REC. 2569 (1890) (emphasis added). The term "citizen" was used in a later draft of Section 1, in an effort to track language from the Constitution and base the Act in part upon federal diversity jurisdiction.

The revision from "citizens" to "persons" in Section 1 appears to have been made only in order to obtain consistency within the Bill after the diversity language was removed; there is no indication that the term "persons" was meant to be limited to only natural persons.

Petitioners also try to link the terms "person" and "citizen" by straining the legislative history of the Clayton Act in 1914. Pet. Br. at

(continued)

The established rule of statutory construction was that a state be included in a statute granting new rights and remedies. At common law, the King could take the benefit of an act of Parliament conferring general rights in general terms even though the act did not expressly mention him. *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1879); *see* 1 W. BLACKSTONE, COMMENTARIES* 262 (1765). In the 1890's, the rule of construction was one of presumptive inclusion:[23]

> It must also be observed that although the state is not to be bound without express words or necessary implication, the same reasons do not apply when the question is as to the right of the state to take the benefit of a new law not expressly made for its advantage. *Here the presumption is rather the other way: and the courts incline to give the government the benefit of new rights and remedies wherever applicable.* When general rights are declared or remedies given by statute, the government is generally to be included, though no named.
>
> BLACK. INTERPRETATION OF LAWS. 98-99 (2d ed. 1896) (emphasis added).

The word "person" would have been understood by Congress to include foreign and domestic statutes both under the existing rule of construction and under the then prevailing judicial interpretations. In *Cotton v. United*

[22](continued)

25. To contend that one Senator's comments evidenced the understanding of the 63rd Congress is at best dubious. It becomes all the more questionable upon review of Senator Walsh's comments, in which he himself indicated in his remarks that his use of the word "citizen" might not be "technically correct." 51 CONG. REC. 13898 (1914).

[23]If foreign governments were to be denied the remedies accorded by Section 4 to "any person," they would be placed in a position inferior to that of other private suitors. *See, e.g., Pierce v. United States*, 255 U.S. 398, 402 (1921), *quoting, Rex v. Woolf*, 2 B & Ald. 609, 611.

States, 52 U.S. (11 How.) 229 (1850), the Court had held that every sovereign is an artificial person:[24]

> *Every sovereign State is of necessity a body politic, or artificial person*, and as such capable of making contracts and holding property. . . . It would present a strange anomaly, indeed, if having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. . . . [A]s a corporation or body politic they may bring suits to enforce their contracts and protect their property . . . .
> *Id.* at 231 (emphasis added).[25]

By the date of passage of the Sherman Act, this principle had become entrenched in the law. Thus, in 1889, the New York Court of Appeals held that a foreign sovereign was a "person" within the meaning of a statute requiring non-resident "persons" to provide security for costs. *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889).[26] The state court noted first the fundamental rule of comity acknowledged by

[24] 1 W. BLACKSTONE, COMMENTARIES * 123 (1765), observed that the word "person" included political entities:

> Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

The courts of this country early recognized the essentially corporate nature of government. *Respublica v. Sweers*, 1 U.S. (1 Dall.) 41, 44 (1779).

[25] *Accord, United States v. Hughes*, 52 U.S. (11 How.) 552, 568 (1850); *Dugan v. United States*, 16 U.S. (2 Wheat.) 172, 181 (1818).

[26] The statute in question expressly mentioned foreign corporations, as does Section 1 of the Clayton Act, in addition to other "person[s] residing without the state." The court did not construe the reference to foreign corporations as a limitation on the meaning of the word "person."

this Court in *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870).[27] It then considered the long-prevailing rule of international law that sovereigns were "persons" within the definition of that term with the legal capacity to maintain actions in their own right.[28] The court concluded that the word "person" was used in the statute "as comprising all legal entities" including specifically the foreign sovereign. 112 N.Y. at 312.

2. Since Passage of the Sherman Act Foreign Sovereigns Have Continued to be Granted Access to United States Courts on the Same Basis as Any Other Person.

In the intervening years between the passage of the Sherman Act and the enactment of Section 4 of the Clayton Act, foreign governmental entities brought a number of anti-

[27] Foreign courts also entertained suits by other foreign sovereigns. *E.g., King of Spain v. Hullett*, 1 D & Cl. 169, 174-176 (1828). In sustaining the right of the Spanish Government to bring a bill in Chancery for an accounting to recover certain monies, the House of Lords per Lords Redesdale and Lyndhurst stated:

> Why should he not have his remedy here as well as any other foreigner? . . . I have no doubt but a foreign sovereign may sue in this country, otherwise there would be a right without a remedy . . . . There is no ground for the notion, that a foreign sovereign cannot sue in the courts of this country. It appears to me clear that he can sue, and it would be monstrous injustice if he could not.

As the Court noted in *The Sapphire*, the United States had availed itself of the right to sue in the courts of other countries.

[28] Previously, it was stated in *Republic of Mexico v. Arangoiz*, 5 Duer 634 (N.Y. 1856):

> [E]very state is a person, an artificial person, in a more extensive and far higher sense than an ordinary corporation . . . . The definition given by other writers on the law of nations, is substantially the same, and, indeed, it is upon the truth of this definition that the whole science of international law is founded . . . .
> *Id.* at 637.

trust-type unfair competition suits for damages and injunctive relief against American companies in U.S. courts. For example, in *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427, 433 (1903), the Court noted that where a government is suing for the prosecution of a private and proprietary right as opposed to a public or governmental right, it is in the same position as any other natural or juristic person with the same rights and subject to the same defenses.[29] Since the passage of the Clayton Act, this Court reaffirmed that foreign sovereign plaintiffs in their private corporate capacity are to be regarded no differently than other persons.

> A foreign sovereign plaintiff should so far as the thing can be done be put in the same position as a body corporate.
> *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134-135 n.2, (1938),[30] *quoting Costa Rica v. Erlanger*, 1 Ch. D. 171, 1974 (1875)

Thus, the historical recognition of sovereigns as artificial persons has remained constant. Congress never has believed other than that foreign governments are entitled to proceed under remedial statutes.

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[29]*See also La Republique v. Schultz*, 94 F. 500 (S.D.N.Y. 1899); *City of Carlsbad v. Kutnow*, 68 F. 794 (S.D.N.Y. 1895); *City of Carlsbad v. Schultz*, 78 F. 468 (S.D.N.Y. 1897).

[30]In addition to *Erlanger*, the Court cited a number of cases, including *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889), that reflect this long-standing judicial attitude.

A foreign state has been accorded standing when asserting claims growing out of its commercial activities, even where it brought suit under a federal statute that enumerated those who could sue, but did not include foreign states. *Swiss Confederation v. United States*, 70 F. Supp. 235 (Ct. Co. 1947), *cert. denied*, 332 U.S. 815 (1947). *See also Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 399 (2d Cir. 1927), *cert. denied*, 275 U.S. 571 (1927). The courts have not restricted governments to the more traditional judicial forums. Thus, in *Lake Ontario Land Development v. FPC*, 212 F.2d 227 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 1015 (1954), the court held that the Government of Canada was a proper party to intervene in an FPC proceeding. The word "person" had not been defined in 18 C.F.R. §1 to include foreign sovereigns among those parties entitled to intervene.

III. PETITIONERS' ARGUMENTS FAIL TO SUPPORT AN EXCLUSIVE INTERPRETATION OF "PERSON."

Petitioners purport to find in the legislative atmosphere of the 1890's an intent to favor domestic interests to the exclusion of foreign. From this climate they argue that Congress would not have intended to include foreign states as among those intended to benefit from the remedial provisions of the Sherman Act. They also argue that an isolated decision interpreting a state Statute of Wills and the confused 1872 Revisors' Note preceding the 1874 Revised Statutes somehow are translated into a Congressional understanding that foreign governments be disqualified as "persons." Even these weak arguments are defective.[31]

A. Petitioners' Argument That The Legislative Climate Was Hostile To Foreign Interests Is Refuted By The Text Of The Act And Primary Legislative Sources.

The text of the Sherman Act refutes petitioners' suggestion of a jingoistic Congressional intent to protect only domestic interests. Congress expressly conferred standing to sue on "foreign corporations" and throughout the Act repeatedly expressed its concern with foreign commerce and trade with foreign nations. See Section II B 3, *supra*. Petitioners simply are in error in asserting that Congress confined its concern to American victims of antitrust violations.

Petitioners' reliance on off-the-floor remarks at political gatherings or remarks concerning the McKinley Tariff Act

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[31]Petitioners argue that non-use by foreign governments of the antitrust laws' remedial provisions gives rise to an assumption that a remedy did not exist in the first place or that it had atrophied from lack of use. Section 4 simply conferred the right to a remedy on all persons damaged by violation of the antitrust laws. No obligation to use the remedy ever was implied nor does non-use affect its availability. *See United States v. Wise*, 370 U.S. 405, 415 (1962).

— a statute wholly unrelated to the Sherman Act — is misplaced.[32] Remarks made *on* the floor concerning the specific legislation at issue here reflect a congressional recognition not only that international commerce was being debilitated by trusts and monopolies but also that a sweeping remedy was needed to combat the evil to be supressed by the Sherman Act. Senator Hoar described the Act as affirming old common law doctrines applicable to "all interstate and international commercial transactions." 21 CONG. REC. 3146 (1890).

Senator Edmonds, a principal draftsman of the final bill, declared that to suppress the detrimental effects of the trusts, it was the purpose of the bill to go just as far as "Congress had the power to go in breaking up these great monopolies that exist to the detriment and injury of mankind *in this country and in every other.*" 21 CONG. REC. 2727 (1890) (emphasis added). To be assured that the objects of the legislation were fulfilled, Congress created a "universal right of action", 21 CONG. REC. at 2612 (remarks of Senator Davis) for the "great class of persons who might be injured . . . ." 21 CONG. REC. at 2612 (remarks of Senator Reagan). *See also* Section II C, *supra*.[33]

[32]Obviously, a tariff act is designed to protect domestic interests, and by its nature is not intended to benefit foreigners. If petitioners' thesis were to be accepted, any legislation passed by a Congress which also enacted tariff legislation could be construed against foreign interests.

[33]The United States has urged other countries to take steps "which will best reduce obstacles to and restrictions upon international trade" and which will "eliminate unfair trade practices" in international trade. 22 U.S.C. §286k (1970). The concepts have been incorporated in bilateral treaties. *See, e.g., Federal Republic of Germany*, 7 U.S.T. 1858-59, and in Executive Branch participation in international forums. At the United Nations Seventh Special Session, then Secretary of State Kissinger stated:

> The United States therefore believes that the time has come for the international community to articulate standards of conduct for both enterprises and governments . . . .

B. The 1874 "Revised" Statute Was Not Intended By Congress To Exclude Bodies Politic By Implication.

Petitioners contend that the general interpretive statute of 1871,[34] which had defined the word "person" to include "bodies politic and corporate," was revised by Congress in 1874 to remove the reference to "bodies politic" and thereby manifested a Congressional intent to exclude foreign governments from the meaning of "person" in Section 4 of the Clayton Act. Assertedly, this deletion was based upon a recommendation reported to Congress by the Commissioners to whom Congress had delegated the task of revising and consolidating the existing federal laws.[35]

[33](continued)

> Laws against restrictive business practices must be developed, better coordinated among countries, and enforced.
>
> Address by Secretary of State Henry A. Kissinger before the Seventh Special Session of the U.N. General Assembly, Sept. 1, 1975.

See generally Davidow, *Extraterritorial Application of U.S. Antitrust Law in a Changing World*, 8 LAW & POL. INT'L BUS. 895 (1976). It would seem strange indeed for the United States to encourage other nations to provide a legal mechanism to prevent restrictive trade practices while simultaneously denying those nations access to our courts to protest against U.S.-originated abuses.

[34]Act of Feb. 25, 1871, ch. 61, §2, 16 Stat. 431.

[35]1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (REVISER'S NOTES):

> Substantially the same as section 2 of the act of February 25, 1871, ch. 16, Stat. at L., substituting at the commencement of the words "In . . . 1871," for "That in all acts hereafter passed;" also, substituting the words "partnerships and corporations" for "bodies politic and corporate." The reasons for the latter change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporations," it

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To be consistent in their position regarding the 1874 "revision", petitioners necessarily must contend that the Court decided incorrectly the following cases in which a political entity has been held to be a "person" within the purview of the Clayton Act and other federal statutes: *South Carolina v. United States*, 199 U.S. 437 (1905); *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U.S. 390 (1906); *Ohio v. Helvering*, 292 U.S. 360 (1934); *Helvering v. Stockholm Enskilda Bank*, 293 U.S. 84 (1934); *Nardone v. United States*, 302 U.S. 379 (1937); *Georgia v. Evans*, 316 U.S. 159 (1942); *California v. United States*, 320 U.S. 577 (1944); *cf. Far East Conference v. United States*, 342 U.S. 570 (1952); *Sims v. United States*, 359 U.S. 108 (1959). This enumeration does not begin to take into account the many lower court cases that have arrived at the same result. To respondents' knowledge, not once in 103 years has a court held that the 1874 "revised" statute cited by petitioners divested a governmental body of a remedy accorded to "any person." It is unlikely that all of these decisions would have overlooked this "revision" or would have disregarded its assertedly dispositive effect.

This Court's historical reluctance to look to the Revised Statutes as a source of "new law" is perhaps best explained by the fact that Congress had no intent whatsoever to make any changes in the law with their enactment. That Congress did not contemplate the slightest modification of existing law stands out clearly in the debates accompanying passage

[35](continued)
is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, & c., appear to be excluded.

of the Revised Statutes. Representative Poland, a member of the Joint Committee, explained:[36]

[36]Petitioners have been highly selective in relating the history which surrounded the passage of the 1874 revised statutes; they neglected to mention that Congress did not intend the 1874 revision to change the pre-existing law. When the Commission made its report to a joint committee of Congress, "[i]t was the opinion of the joint committee that the commissioners had so changed and amended the statutes that it would be impossible to secure the passage of their revision." Dwan and Feidler, *The Federal Statutes —Their History and Use*, 22 MINN. L. REV. 1008, 1013 (1938). Concluding that Commission's work represented unintended legislation, Congress engaged the services of Thomas Jefferson Durant, a Washington lawyer, to review and eliminate all changes in the law made by the Commission. Congress considered the Durant draft, not the Commission's during the special evening sessions held for the purpose of passing the first omnibus consolidation of the U.S. laws. Among other alternations, Durant removed all of the notes provided in the Commission's draft before the proposed statutes were presented to Congress. *See* UNITED STATES REVISION OF THE LAWS (Report of T. J. Durant 1873).

Mr. Poland noted that in the short time given to complete the job Mr. Durant and the Committee may not have detected every change of language made by the Commissioners in view of the voluminous amount of material. 2 CONG. REC. 820 (1874). Under the circumstances, it is not surprising that the actual language of Section 1 never reverted to that of the 1871 statute; however, it is clear that Congress did not intend to alter the meaning of the definition contained in the earlier version. Indeed, Representative Hoar, a member of the joint committee, declared in unequivocal terms the guiding principle which governed the Committee's work:

> Mr. E.R. Hoar: . . . We are trying as carefully as we possibly can to avoid any changes in existing law.
>
> Mr. Eldredge: Then I understand the committee to take this position, that however absurd a provision may have crept into the existing law, it is not the purpose of the committee to even correct such a thing.
>
> Mr. E.R. Hoar: Exactly. We thought it impossible to go through with this work if we departed from that rule.
> 2 CONG. REC. 823 (1874).

> [T]he Committee on the Revision of the Laws, under the authority of the act, employed Mr. Durant, a lawyer of this city, to take this work [the Commission's draft] and go over it and expunge from it everything in the nature of change; anything that altered the law from what it stood upon the statute-book.
> 2 CONG. REC. 819 (1874) (emphasis added).

It is hard to understand how petitioners can ascertain from this history a Congressional intent to change the law to exclude governmental entities from the definition of the word "person."

The Revisers' Note on which petitioners seek to place reliance is hopelessly ambiguous. It most logically is subject to the interpretation that if future legislators wished to exclude sovereign entities as persons, they must do so expressly. The revisers recognized that the term "corporation" standing alone could be read to include bodies politic. Thus, they admonished future draftsmen employing the word "person" to "take care that States, Territories, foreign governments" are "excluded" specifically if exclusion were the statutory intent.

C. *United States v. Fox* Does Not State A General Exclusionary Rule.

Petitioners urge that *United States v. Fox*, 94 U.S. 315 (1876), stands for the proposition that prior to the Sherman Act sovereigns were not included as persons in the absence of express statutory definition. *Fox* offers precious little support for this contention. The decision held only that under the Statute of Wills, as adopted in New York, the United States was subject to the local rule that the sovereign could not inherit real property located in New York.

Not only was the holding an exception to the prevailing rule including sovereign as persons,[37] see Section II D, *supra*, but *Fox* does not purport to state a general rule of exclusion beyond the New York law on the validity of a devise of land. It does not even state a general rule of New York law on the definition of "person." Both before[38] and after[39] *Fox*, New York courts held that foreign sovereigns were "persons" under New York law.

In *Stanley v. Schwalby*, 147 U.S. 508 (1893), this Court re-affirmed that when a statute uses but does not define the term "person," the sovereign is entitled to claim rights available to any other person:

> Of course, the United States were not bound by the laws of the State, yet the word "person" in the statute would include them as a body politic. . . .
> *Id.* at 517.

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[37] In addition to *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889), the state courts have found a variety of political entities to be included within the word "person" standing alone in a statute. *E.g., County of Lancaster v. Trimble*, 34 Neb. 752, 756 (1892) (a county was held to be a "person" under a statute authorizing "any person" to foreclose a tax lien); *Martin v. State*, 24 Tex. 61, 68 (1859) (the State of Texas was held to be a "person" within the meaning of a criminal statute which prohibited the making of a false entry with the intent to defraud "any person."); *Giddings v. Holter*, 19 Mont. 263, 267 (1897) (United States held to be a person within the terms of covenant of quiet enjoyment which referred to claims by "all and every person or persons"); *State v. Duniway*, 63 Ore. 555, 558-59 (1912) (State can maintain action of ejectment under Code provision. "The words 'any person' specifying who may bring the action, were intended and are broad enough to include artificial as well as natural person."); *Kansas v. Herold*, 9 Kan. 194 (the United States is a 'person' within the meaning of section of "Act to prevent certain trespasses"); *State v. Woram*, 6 Hill 33, 40 Am. Decisions 378, 381 (1843) (State included in the words "any person" in a statute defining payees of promissory notes).

[38] *Republic of Mexico v. Arangoiz*, 5 Duer 634 (N.Y. 1856).

[39] *Republic of Honduras v. Soto*, 112 N.Y. 310 (1889).

In light of these cases, petitioners are incorrect in their assertion that *Fox* implies that sovereigns were presumed to be excluded from the definition of "person."

D. Petitioners' Federalism Argument Is Unsupported And Untenable.

Petitioners have fashioned out of whole cloth a contention that federalism was an important basis of this Court's decision in *Georgia v. Evans*. Pet. Br. at 27-28. Not only was federalism not the basis of the decision in *Georgia*, it was not even mentioned in the opinion. Petitioners' contrivance is based upon a reference to an alternative argument in the Brief of the State of Georgia. The Court did not bother to comment on this alternative.

Petitioners' contention also fails because in *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906), a municipal government's right to sue as a person under Section 7 of the Sherman Act was recognized. Concepts of federalism could not be applicable to this decision involving a lesser governmental entity. Lastly, with respect to purchases made in the United States, a foreign government has no more ability to apply its sovereign power than does a state making purchases in interstate commerce.[40] See Section I(A), *supra*.

CONCLUSION

Petitioners would have this Court disregard the line of cases and legislative pronouncements exhorting an inclusive definition of "person" because they envision possibly severe economic consequences to antitrust conspirators. Pet. Br. at 38. It was not the purpose of Section 4,

[40]Standing is merely a threshhold issue, not a determination of liability. In order to effect any recovery, foreign governments would have to proceed in compliance with the Federal Rules of Civil Procedure to establish an injury to business or property by reason of a violation cognizable under the antitrust laws.

however, to protect wrongdoers but, rather, to require them to account for their ill-gotten gains. The familiar cry of Chicken Little that "the sky is falling" is not novel to the petitioners herein. As long ago as 1904, the Court gave an effective rejoinder to these speculations:

> It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. . . . But even if the court shared the gloomy forebodings in which the defendants indulge, it could not refuse to respect the action of the legislative branch of the Government if what it has done is within the limits of its constitutional power . . . .
> *Northern Securities Co. v. United States*, 193 U.S. 197, 351 (1904).

The general rule applied by this Court in the antitrust field is that "exemptions from antitrust laws" must be expressly stated by Congress; they will not be found by implication. *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973). By urging this Court to leave the decision to Congress, defendants are asking this Court to carve out just such an exemption by giving conspirators immunity from damage claims on sales to foreign states.

As the District Court below observed, to deprive foreign states of a remedy would undermine "the effective enforcement of the antitrust laws" leaving unchecked conspiracies in foreign sales that "would certainly have an adverse effect on domestic competition." App. at A-7, 8.

To exempt foreign states *alone* from the protection afforded by the antitrust laws finds no support in the legislative history, the text, the purposes of the law, or in any decided case. It would contravene the interpretation of the law made by that very branch of the government charged with the conduct of the foreign relations of the

United States. It would deprive foreign states of a right which the Eighth Circuit correctly concluded "Congress intended . . . [them] to enjoy . . . ." Pet. App. at B-7. It "would manifest a want of comity." *The Sapphire*, 78 U.S. (11 Wall.) 164, 167 (1870). It would be unjust and unfair. It would work an embarrassment to the relations between the United States and foreign states.

For the above reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted.

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Dated: August 4, 1977

FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN and THE REPUBLIC OF THE PHILIPPINES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' JOINT REPLY BRIEF

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INDEX

TABLE OF AUTHORITIES

Cases

Treaties

Statutes

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Petitioners submit this brief in reply to the joint brief for respondents ("Resp. Br."), the memorandum for the United States as amicus curiae dated August 1977 ("Gov. Mem. II"), and the brief for the Federal Republic of Germany as amicus curiae ("Ger. Br.").

The arguments of respondents and the amici concern two distinct questions: *first,* whether Congress intended the term "person," as employed in sections 7 of the Sherman Act and 4 of the Clayton Act, to include foreign governments; *second,* whether, as a matter of policy, this Court should authorize treble damage suits by foreign governments.

ARGUMENT IN REPLY

I.

Congress Did Not Intend to Confer a Cause of Action for Treble Damages Upon Foreign Governments, and It Legislated in Terms Which It Understood to Preclude Such a Result.

Respondents offer no evidence that Congress intended to grant foreign governments the treble damage remedy which it withheld from the United States. They contend

instead that such an intention should be imputed to Congress on a variety of grounds, and that the contrary evidence of the legislative environment should be disregarded.

1. Judicial Decisions Prior to 1890 Confirmed that "Person" Did Not Include Sovereign Governments Unless Specially Extended.

The respondent foreign governments are quite wrong in asserting that it was "settled law" in 1890 that the word "person," when used in a statute, presumptively included sovereign governments, and that Congress would have so understood the term. Resp. Br. 26-27. In the leading case, *United States* v. *Fox*, 94 U.S. 315 (1876), this Court had held that although the term "person" might be used in an enlarged sense so as to include a sovereign government, such as that of the United States, "[i]t would require an express definition to that effect to give it a sense thus extended." 94 U.S. at 321. In 1941 this Court relied upon the *Fox* case when it stated, in *United States* v. *Cooper Corp.*, 312 U.S. 600, that "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." 312 U.S. at 604. The rule of the *Fox* case applies both to the domestic sovereign and to foreign sovereigns.[1] *Fox* has never been overruled, and Congress was entitled to suppose that the Sherman Act would be construed in accordance with that rule.[2]

1. For purposes of the New York statute at issue in *Fox*, the United States was not the domestic sovereign but a "foreign" government—a coordinate sovereign outside the jurisdiction of New York. *See United States* v. *United Mine Workers*, 330 U.S. 258, 275 (1947) ("person" does not include "sovereign governments").

2. Our adversaries argue that another New York case decided in 1889, and never reviewed by this Court, casts doubt upon *Fox's* principle of statutory construction. *See* Resp. Br. 30 n.30; Gov. Mem. II 5 n.4. But that case, *Republic of Honduras* v. *Soto*, 112 N.Y. 310, 19 N.E. 845 (1889), applied the very same rule of construction, since it held that, in a statute requiring nonresident plaintiffs to post bond for court costs, a reference to any "person residing without the state" was expressly defined to extend to all plaintiffs, since the statute was "stated to be a re-enactment of the previous [version of the] statute," which had required such a bond of "any plaintiff, not residing within the jurisdiction . . . ." Since there was evidence that the legislature had intended no change, "the word 'person' was, we think, used in its enlarged sense . . . ." 112 N.Y. at 311-12, 19 N.E. at 845-46. The decision reflected concern that if a foreign government were allowed to sue without posting a bond for costs, it could not subsequently be compelled to pay those costs. *See, e.g., Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelsen*, 43 F.2d 705, 708 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931). *Compare* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1609-1610 (1976).

The dictum in *Dollar Savings Bank* v. *United States*, 86 U.S. (19 Wall.) 227 (1873), upon which respondents purport to rely (Resp. Br. 27), also confirms that, at common law, a statutory prohibition addressed to "any person or persons, bodies politic or corporate" was *not* understood to include the domestic sovereign. 86 U.S. at 239. It was sometimes said that the King might "take the benefit of any particular act, though not named" (*id.*), but that rule, and its various corollaries, operated only for the benefit of the domestic sovereign, "the government by which [the statute] is enacted." *See In re Receivership of the Columbian Marine Insurance Co.*, 3 Keyes 123, 125 (N.Y. 1866). *See also In re Fox*, 52 N.Y. 530 (1873), *aff'd*, 94 U.S. 315 (1876). There is no room for implied remedies under the Sherman Act, even for the benefit of the domestic sovereign, because, as this Court established long ago, Congress intended the remedies fixed by the Sherman Act to be exclusive, and "available only to those on whom they are conferred by the Act." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941). *See Geddes* v. *Anaconda Copper Mining Co.*, 254 U.S. 590, 593 (1921); *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27, 29 (1916); *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174 (1915).

Respondents also cite two cases from the period prior to 1874 in which a sovereign government was described as an "artificial person." *Cotton* v. *United States*, 52 U.S. (11 How.) 229, 231 (1850) (Resp. Br. 27-28); *Republic of Mexico* v. *Arangoiz*, 5 Duer 634, 637 (N.Y. 1856) (Resp. Br. 29 n.28). But those cases did not concern the construction of the term "person" as employed in a statute; rather, they used the term in its metaphorical sense and established, not that sovereign governments were "per-

sons," but that, like persons, they could contract, acquire property and vindicate their rights in court. Other cases reached the same conclusion without describing such a government as an artificial person.[3]

2. Upon Revision of the Statutes in 1874 Congress Took Care to Ensure that "Person" Would Not be Inadvertently Extended to Include Foreign Governments.

While respondents and the amici appear to disagree with us and with each other as to the significance of the revision of 1874 (*compare* Resp. Br. 33-36 *and* Gov. Mem. II 8-9), the essential points are undisputed. Congress had enacted the general definitional statute of 1871 in order to facilitate the task of the Commissioners who were preparing the Revised Statutes. *See* CONG. GLOBE, 41st Cong., 3d Sess. 776 (1871), cited Pet. Br. 19. As enacted, it provided that "the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that [it was] intended to be used in a more limited sense."[4] But in 1872 the Commissioners recommended that Congress delete the phrase "bodies politic and corporate" and replace it with a reference to "partnerships and corporations." As the Commissioners explained,

> The reasons for the latter change are that partnerships ought to be included; and that if the phrase "bodies politic" is precisely equivalent to "corporation," it is redundant; but if, on the contrary, "body politic" is somewhat broader, and should be understood to include a government, such as a State, while "corporation" should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word "person," to take care that States, Territories, foreign governments, &c., appear to be excluded.
>
> 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS 19 (1872) (Revisers' Note).

3. *E.g., United States* v. *Hughes*, 52 U.S. (11 How.) 552, 568 (1850); *Dugan* v. *United States*, 16 U.S. (3 Wheat.) 172, 181 (1818), cited Resp. Br. 28 n.25.

4. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431.

In 1874 Congress adopted the recommended change as a part of the first section of the Revised Statutes.[5]

Respondents argue that this history is insignificant because Congress did not intend the Revised Statutes to be a source of "new law" and because the Joint Committee on the Revision of the Laws had engaged the services of T. J. Durant to remove the Commissioners' substantive changes from the revision. Resp. Br. 35 n.36. Respondents also suggest that Congress was unaware of the purpose of the 1874 revision, that "Congress considered the Durant draft, not the Commission's," and that "Durant [had] removed all of the notes provided in the Commission's draft before the proposed statutes were presented to Congress." Resp. Br. 35 n.36. We respond to each of these claims.

First, the revised definition of "person" was not a substantive change. Rather, the enactment of 1871 had contained an ambiguity which the Commissioners discovered and eliminated, replacing the ambiguous term, "bodies politic and corporate," with "corporations." It was the revisers' acknowledged task to place a clear construction on the statutes. *See* 2 CONG. REC. 826 (1874) (remarks of Rep. Lawrence). The general definition of "person" had been adopted to permit statutory revision upon a uniform pattern, and it was also to apply in statutes subsequently enacted. The construction which the Commissioners placed on the term "bodies politic and corporate" was sound and well supported.[6]

5. Act of June 22, 1874, 18 Stat., pt. 1, at 1, 1092.

6. BURRILL'S LAW DICTIONARY (2d ed. 1867) defined "body politic" as "[a] term applied to a corporation, which is usually designated as a *body corporate and politic*." *Id.* 212 (emphasis in original). BLACK'S LAW DICTIONARY of 1891 also indicated that a corporation "is usually designated a body corporate and politic." *Id.* 143. For the history of the term "body politic and corporate," see, e.g., *Warner* v. *Beers*, 23 Wend. 103, 122-23 (N.Y. 1840), indicating, in substance, that the term meant corporations, such as a University or a medieval guild. In popular usage, "bodies politic" has come to mean "political bodies," but the term was derived, not from politics, but from the "policy" of the law, which conferred continuous succession upon the bodies in question, even though their membership might vary. For the etymology of the term, see *People* v. *Morris*, 13 Wend. 325, 334 (N.Y. 1835), quoting Lord Coke. Respondents have apparently misunderstood their quotation from

As for the claim that Congress was unaware of the reason for the revision, the record of debate indicates that *both* the Durant draft and the Commissioners' Report, with its explanatory notes, were before Congress when it considered and enacted the Revised Statutes. As Representative Lawrence stated upon introducing the matter, "[t]he commissioners, *whose revision in two volumes is now before us,* and Mr. Durant, whose work is also here, . . . have all certainly displayed great learning, ability, and skill in this very difficult and herculean labor assigned them." 2 CONG. REC. 826 (1874) (emphasis added).

The revised definition of "person" appeared on the very first page of the Revised Statutes, as submitted for enactment. The reason for the change was clearly explained in the Report of the Commissioners. There is evidence that Congress critically considered the revision of the definitional statute, since it altered the proposed definition of "vessel," which also appeared on the first page of the Revised Statutes. Pet. Br. 24 n.30, citing 2 CONG. REC. 822 (1874); *see* UNITED STATES REVISION OF THE LAWS 1 (Report of T. J. Durant, 1873). But Congress adopted the Commissioners' revised definition of "person," and the principal members of Congress who were concerned with the Revised Statutes included Senator Edmunds and Representative (later Senator) G. F. Hoar, who subsequently drafted the Sherman Act. *See* Pet. Br. 17-18, 24 n.30.

The Department of Justice contends that Congress's deletion of the reference to bodies politic is not significant since "the definition . . . was phrased in illustrative words of inclusion . . . ." Gov. Mem. II at 9. But the "illustrative

Blackstone, who used "corporations" as a term interchangeable with "bodies politic." *See* Resp. Br. 28 n.24 citing 1 W. BLACKSTONE, COMMENTARIES *123. This Court used the term "body politic" to mean corporation in *Louisville, C. & C. R. R.* v. *Letson*, 43 U.S. (2 How.) 497, 552 (1844) and again in *United States* v. *Fox*, 94 U.S. 315, 321 (1876) ("bodies politic, deriving their existence and powers from legislation"). *See In re Fox*, 52 N.Y. 530, 535 (1873) (corporations are "artificial persons; bodies politic").

words of inclusion" had formerly included the phrase "bodies politic," and Congress chose to exclude, to omit or delete, those words. It did so in order to establish a rule of statutory construction. Contrary to the Department's suggestion, the definitional statute authorizes extension of the term "person" only to the entities there enumerated. If entities excluded from the definitional statute in 1874 are to be regarded as "persons" under other statutes, the authorization for such deviation from the established rule must be found in the intent of Congress as manifested in those other statutes.[7]

The drafters of the Sherman Act employed an express definition in section 8 to expand the scope of the term "person" somewhat beyond that established by the definitional statute of 1874 and the *Fox* case (*see* Pet. Br. 21-22), but they chose not to extend the term to include foreign governments. They were justified in supposing that, without such an express definition, the Judiciary would not itself undertake that extension.[8]

7. Compare section 13 of the Interstate Commerce Act of 1887, where Congress took care to refer to "any body politic or municipal organization," as well as other kinds of "persons," apparently to assure a remedy for state railroad commissions and the like. Act of Feb. 4, 1887, ch. 104, § 13, 24 Stat. 383-84. When Congress wishes to extend the term "person" to include "foreign governments," it does so by special definition. *See, e.g.*, International Investment Survey Act, 22 U.S.C. § 3102; Atomic Energy Act, 42 U.S.C. § 2014.

8. Respondents argue that the reference in sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) to "commerce among the several States, or with foreign nations," suggests that Congress wished to protect foreign nations. Resp. Br. 19-20. But, as this Court has held, that language was "the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 495 (1940); *see Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 434 (1932). The use of language from the Constitution resolved the problem of the possible overbreadth of Senator Sherman's bill, which had been discussed at length in the Senate. Pet. Br. 17-18. The treble damage remedy itself "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977). *See* Pet. Br. 10-11. There is no evidence of an intent to benefit foreign nations.

3. Contrary to Respondents' Claim, the Decisions of this Court Have Respected the Rule of Construction Established by Congress in 1874.

Respondents suggest that the purpose of the 1874 revision should be disregarded since, as they claim, "not once in 103 years has a court held that the 1874 'revised' statute . . . divested a governmental body of a remedy accorded to 'any person.'" Resp. Br. 34. But respondents appear to have overlooked the Court's decision in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947), where it referred to the Revised Statutes' definition of "person" and held that it reflected an intent of Congress to exclude sovereign governments. As the Court stated,

> Congress made express provision, R.S. § 1, 1 U.S.C. § 1, for the term [person] to extend to partnerships and corporations . . . . The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.
> 330 U.S. at 275.

In *Cooper* and *Fox* the Court applied the same rule to deny a benefit to a sovereign government.

The Justice Department observes that, despite elimination of the words "bodies politic" from the definition of "person," cities and states of the Union are allowed to seek treble damages under the Sherman Act, and contends that, since the decisions have gone that far, this Court should go further and impute to Congress an intent to extend the cause of action to all "political bodies." Gov. Mem. II 8-9. But the cause of action was extended to cities because they were "corporations." *See City of Atlanta* v. *Chattanooga Foundry & Pipeworks,* 127 F. 23, 25 (6th Cir. 1903) (Lurton, J.), *aff'd,* 203 U.S. 390 (1906). It was extended to States of the Union in *Georgia* v. *Evans,* 316 U.S. 159 (1942), because the "legislative environment" (*id.* 161) showed that Congress intended to protect the States, and denial of a federal damage remedy might have left the States with "no recourse whatever" against conduct prohibited under both state and federal law. 316 U.S. at 162-63. *See* Pet. Br. 27-31.

On the other hand, the cause of action for treble damages was denied to the United States, the domestic sovereign, even though its proprietary interests were substantially the same as those of American consumers, whom Congress sought to protect in the Act. This Court held that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." *United States* v. *Cooper Corp.,* 312 U.S. 600, 605 (1941). The proprietary interests of foreign governments were not among those which Congress sought to protect, and Congress manifested no desire to give such governments a role in enforcing the Act. The establishment of a damage remedy or enforcement role for such governments lacks even "logical" appeal, and it was not authorized by the legislature.

The respondent foreign governments insist that a number of cases decided by this Court outside the antitrust field conflict with the rule of construction adopted by Congress upon revision of the statutes in 1874. *See* Resp. Br. 34. But respondents' claims for those cases are grossly exaggerated. None concerned a foreign government. Only two of the cases held that a State was a "person." In one of those, the legislative history revealed a clear intent, expressed by the manager of the bill on the floor of the House of Representatives, to include the States, and "it would have defeated the very purpose for which Congress framed the scheme for regulating waterfront terminals to exempt those operated by governmental agencies." *California* v. *United States,* 320 U.S. 577, 585-86 (1944).[9] The result in the other case, *Ohio* v. *Helvering,* 292 U.S. 360 (1934), was dictated by considerations of federalism, *i.e.,* the need to

9. Respondents have edited their quotation from this decision in such manner as to alter its meaning. *See* Resp. Br. 17 n.10. The Court indicated it was unnecessary to "waste time on useless generalities" about the extension of the term person to include the States; but that was only *"if its* [the act's] *plain purposes preclude their exclusion."* 320 U.S. at 585 (emphasis added). Respondents have inserted an ellipsis in their quotation in place of the italicized language. *See* Resp. Br. 17 n.10.

maintain an existing system of federal taxation against efforts to divert the same revenues into the treasuries of the States.[10]

Respondents' remaining cases (Resp. Br. 34) do not concern the question whether a sovereign government is a "person."[11] The cases are consistent with the rule which Congress adopted in 1874 and which this Court applied in *Fox, Cooper* and *United Mine Workers.*

10. When South Carolina took over the liquor business in that State, this Court held that state employees ("dispensers") were "persons" upon whom the United States could impose an existing tax. *South Carolina* v. *United States,* 199 U.S. 437, 448 (1905). When Ohio sought to defeat the system of federal taxation in a similar manner some thirty years later, this Court had no difficulty in concluding that Congress had intended to impose the tax on any "person" —including a State—that might undertake the business. *Ohio* v. *Helvering,* 292 U.S. 360 (1934). Both decisions were dictated by considerations of federalism—the need to protect the federal revenue against conflicting demands by the States.

11. *Nardone* v. *United States,* 302 U.S. 379 (1937), held that federal agents were persons. *Helvering* v. *Stockholms Enskilda Bank,* 293 U.S. 84 (1934), held that income from the United States government was from a "resident" for purposes of the tax code and suggested that this was a "legal fiction" necessary for the sensible application of the tax laws. 293 U.S. at 92.

Our adversaries contend that in *Swiss Confederation* v. *United States,* 70 F. Supp. 235, 236-37 (Ct. Cl.), *cert. denied,* 332 U.S. 815 (1947), the Court of Claims allowed foreign governments to sue "under a federal statute that did not include foreign states in its enumeration of eligible plaintiffs . . . ." Gov. Mem. II at 8; *see* Resp. Br. 30 n.30. But the statute in question contained *no such enumeration at all.* It gave the Court of Claims jurisdiction of " 'all claims . . . in respect of which . . . the party would be entitled to redress against the United States,' [with] no limitation on the right of any party to sue because of his nationality, corporate status, or for any other reason." 70 F. Supp. at 236. The court did refer to a limitation imposed on enumerated parties who were " 'citizens or subjects' " of certain foreign governments, but held that, since foreign governments themselves were not enumerated, they were not subject to the limitation. *Id.*

The dictum in *Stanley* v. *Schwalby,* 147 U.S. 508 (1893), suggested that if the United States could be sued under Texas Law, it would be entitled to claim the benefit of repose under a Texas statute of limitations which referred to "persons;" but the Court noted that a Texas decision had held that the State of Texas was itself a "person" (147 U.S. at 517), and the dictum appears to reflect the principle of federal supremacy, which had long required the federal courts to regulate application of state statutes of limitation to the federal government, assuring it uniform prerogatives throughout the nation. *See, e.g., United States* v. *Hoar,* 26 Fed. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373).

4. Congress Understood that the United States Had No Recourse to the Treble Damage Remedy Because It Was Not a "Person."

Respondents contend that the remarks of Senator Sherman establish that Congress intended to deny the United States any damage remedy, irrespective of the question whether the United States was a "person." Resp. Br. 14-15. But when Senator Sherman said that the civil damage action was "not to be prosecuted at all by the United States" (21 CONG. REC. 2563 (1890)), he referred to the second section of his bill, which conferred a cause of action only upon a "person or corporation injured or damnified." *See id.* His statement undoubtedly reflected the view that the United States was not a "person or corporation." And if that language gave the United States no claim for damages incurred, neither it nor the language subsequently employed by the Senate Judiciary Committee gave such a claim to the sovereign governments of foreign nations.

Respondents suggest that, unlike other sovereign governments, the United States had no need for a damage remedy since it had chosen for itself other weapons of enforcement. Resp. Br. 15. But the weapons referred to are not for "self-protection," as respondents assert (*id.*), but for the protection of the public. Their use may contribute to the protection of all who seek to purchase from American business. But in 1890 and again in 1914 Congress denied the United States any remedy for damages incurred in its proprietary capacity. If Congress thought it unnecessary to give the domestic sovereign any remedy for damages incurred, it surely saw no need to give such a remedy to foreign governments.

5. Contrary to Respondents' Assertion, The Common Law of Restraints of Trade Gave No Cause of Action for Damages.

Respondents suggest that foreign governments would have had "common law rights" when injured by a contract in restraint of trade, that the Sherman Act merely opened "the federal courts to all who were injured," and that Con-

gress would not have wished to deny foreign governments a statutory damage remedy which corresponded to their pre-existing common law right to damages. Resp. Br. 8. In this, however, respondents appear to misunderstand the common law. Contracts in restraint of trade "were deemed illegal and were unenforcible at common law. But the resulting restraints of trade were not penalized and gave rise to no actionable wrong." *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 497 (1940). The same point was made in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), where Circuit Judge Taft noted that "all the law lords were of opinion [in *Mogul Steamship Co.* v. *McGregor, Gow & Co.*, [1892] App. Cas. 25] that contracts void as in restraint of trade . . . gave no right of action for damages to one injured thereby." 85 F.2d at 286.[12]

In section 1 of the Sherman Act, Congress prohibited combinations in restraint of trade, without identification of the parties to such combinations, but it established criminal

12. The common law cases cited by Senator Sherman in the anti-trust act debates (21 CONG. REC. 2458-59 (1890)), concerned the enforcibility of contracts said to be in restraint of trade, not claims for damages. *See, e.g., Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887); *Richardson* v. *Buhl*, 77 Mich. 632, 43 N.W. 1102 (1889). *Cf. People* v. *North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890) (statutory dissolution of corporation for violation of its charter). The Statute of Monopolies of 1623 represented an effort by Parliament to restrain the King's power to grant monopolies; its treble damage remedy had no application to common law restraints and, contrary to the suggestion of the Department of Justice (Gov. Mem. II 7 n.8), it was undoubtedly unavailable to foreign governments. As the Court of King's Bench pointed out in 1685, the King retained "controlling power over all trade with infidels . . . over all foreign trade in general . . ." *East-India Co.* v. *Sandys*, 90 Eng. Rep. 103, 104 (K.B. 1685). The statute itself was irrelevant to the American scene. *See* Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 258 (1917); Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355, 366 (1954). The arcane common law offenses of forestalling, regrating and engrossing gave rise to no damage action. "[T]he general penalty for these three offenses, by the common law (for all the statutes concerning them were repealed by 12 Geo. III., c. 71 [1772]), is, as in other minute misdemeanors, discretionary fine and imprisonment." 4 W. BLACKSTONE, COMMENTARIES *159.

penalties only for the "persons" who might participate in them. In section 2 it established criminal penalties for "persons" who monopolize. In section 7 it created a cause of action for treble damages and attorney's fees, which had been unknown to the common law, and it conferred that cause of action only upon "persons." In so doing it deprived neither itself nor any other sovereign government of any pre-existing common law remedy.[13]

6. The Decision in *Georgia* v. *Evans* Created an Exception Solely for the States of the Union, Which Have Yielded Their Sovereign Powers Over Interstate and Foreign Commerce to Congress.

Respondents suggest that this Court "contemplated standing for foreign countries" when it decided *Georgia* v. *Evans*. Resp. Br. 16. They point to language from that case referring to a Congressional intent "to bring state or nation within the scope of the law." *Id.* But they have omitted the interior quotation marks which would have shown that the Court was itself quoting from *United States* v. *Cooper Corp.*, 312 U.S. at 604-05. *See Georgia* v. *Evans*, 316 U.S. at 161. The Court's purpose in quoting from the earlier decision was to show that the premises of the two decisions were in fact consistent. In *Cooper* the Court had held that a "nation" was not a "person," and the *Georgia* Court confirmed that, although States of the Union were "persons," it was not disturbing the earlier decision as to the "nation."

The respondents also suggest that this Court has laid down criteria for determining the scope of the term "per-

13. As respondents point out (Resp. Br. 30 n.29; *see* Gov. Mem. II 8), after enactment of the Sherman Act the French Republic, as owner of the Vichy spring, brought a common law action to enjoin the use of that name by an American bottling concern, which it charged with the common law tort of unfair competition. *See French Republic* v. *Saratoga Vichy Spring Co.*, 191 U.S. 427, 434 (1903). The City of Carlsbad brought similar actions. *See City of Carlsbad* v. *Kutnow*, 68 F. 794 (C.C.S.D.N.Y.), *aff'd*, 71 F. 167 (2d Cir. 1895); *City of Carlsbad* v. *Schultz*, 78 F. 469 (C.C.S.D.N.Y. 1897). But these were not "antitrust type" actions. They were common law actions in which the plaintiffs sought to vindicate their property rights in a commercial name.

son" which "require an inclusive interpretation." Resp. Br. 16. But the criteria to which respondents refer are "aids to construction which may indicate an *intent*." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604-05; *Georgia* v. *Evans*, 316 U.S. 159, 161 (emphasis added). We have already shown that "[t]he purpose, the subject matter, the context, [and] the legislative history" all indicate that Congress did not desire to extend to foreign governments the treble damage remedy which it withheld from the United States. Contrary to respondents' suggestion (Resp. Br. 16), the "executive interpretation," as reflected in the present position of the Justice Department, offers no guidance as to the intent of Congress in 1890. Indeed, previous statements and practice suggest a more traditional view on the part of the Executive that foreign governments have no claim for treble damages.[14]

In *Georgia* v. *Evans* the Court held that the question "[w]hether the word 'person' or 'corporation' includes a State or the United States depends upon its legislative environment." 316 U.S. at 161. If "legislative environment" is indeed the test, it is plain that Congress wished to protect the States, but granted no cause of action to foreign governments. *See* Pet. Br. 13-15; 21 CONG. REC. 4253 (May 7, 1890) (remarks of Representative McKinley).

Respondents claim that the "legislative atmosphere" or "legislative climate" should be disregarded since they think it reveals a "jingoistic proclivity." Resp. Br. 9. But it is indisputable that the Congresses that wrote the antitrust laws sought in good faith to protect the interests of the United States, and it was their task under the Constitution to formulate national economic policy. Accordingly, the "economic judgment" of Congress is "quite relevant in

14. *See, e.g.*, Letter from Attorney General Herbert Brownell to Senator Harley M. Kilgore (June 16, 1955), *reprinted in* S. REP. No. 619, 84th Cong., 1st Sess. 7 (1955), discussed Pet. Br. 26. *See also* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS at 385 (1955). Compare the former practice of authorizing joint resistance by American oil companies against economic demands by foreign governments, discussed in the petition for certiorari at 11 n.6.

interpreting the language Congress chose." *See United States* v. *Concentrated Phosphate Export Association*, 393 U.S. 199, 208 (1968). An intention to authorize treble damage suits by foreign governments would have been inconsistent with that economic judgment, and such an intention cannot fairly be imputed to Congress.

II.

Respondents' Policy Arguments Provide No Basis For Judicial Extension of the Treble Damage Action to Foreign Governments.

The evidence establishes that Congress did not seek to benefit foreign governments (*see* Pet. Br. 10-15) and that it legislated in terms which it understood to preclude treble damage suits by such governments. That being so, it is idle for respondents to contend that "policy" arguments call for such suits. Such arguments should be addressed to Congress. In advancing them here, respondents misconceive the role of the Judiciary, particularly in the delicate areas of foreign relations, the balance of payments and national fiscal policy. *See United States* v. *Gilman*, 347 U.S. 507, 511 (1954); *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 314 (1947).

1. The Help of Foreign Governments is Not Essential to the Enforcement of Our Antitrust Laws.

Citing the 1971 decision by the District Court, respondents suggest that the "real question" in these cases is not the intent of Congress, but "'whether the maintenance of [treble damage actions by foreign governments] is essential to the effective enforcement of the antitrust laws.'" Resp. Br. 3; A 7. The Court of Appeals found it unnecessary to comment on this assertion, no doubt because the antitrust laws have been enforced for many years without the aid of foreign governments. The increase in private treble damage cases over the past ten years confirms that there is little danger that those laws may go unenforced.[15]

15. *See* [1977] ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 20 ("Antitrust Cases Commenced, Statistical Years 1960-1977").

Indeed, the real question is whether the federal courts will be able to hear and resolve all the antitrust claims of those whom Congress sought to protect.

The Department of Justice apparently agrees that the antitrust laws were not intended to protect "foreign persons in foreign markets."[16] But it summarizes the allegations of the complaints in these cases in order to show that, even though the goods involved were "manufactured in the United States for shipment abroad . . . [or] manufactured abroad by petitioners' licensees or subsidiaries" (Gov. Mem. II at 2), the alleged restraints might have had an impact upon domestic markets. According to the Department's theory, even though Congress had no interest in regulating foreign markets, those who purchase in such markets should nonetheless be allowed to sue under our antitrust laws when they complain of restraints there which would have had a simultaneous impact within the United States. In that case, says the Department, foreign purchasers should gain a cause of action, not because Congress wished to protect them, but because authorization of such suits may further the goal of deterring domestic violations.[17]

16. *See* Pet. Br. 11, quoting from Address by Douglas E. Rosenthal, Assistant Chief, Foreign Commerce Section, Antitrust Division, Department of Justice, to the American Society of International Law Annual Meeting (April 23, 1977) ("Rosenthal Speech") at 9. The full text of the speech has been lodged with the Clerk of the Court by the Department of Justice. *See* Gov. Mem. II 12 n.12.

17. Rosenthal Speech 6-10, 14-15. While the merits of the Department's choice of law theory are not before the Court, the proper rule may be that nonresident aliens must have sufficient contacts with the United States before they may claim the protection of our antitrust laws, instead of the economic regulations of the market in which they make their purchases. Courts "must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to [such claims] rather than leave the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 985 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). *See* 51 CONG. REC. 13898 (1914) (remarks of Senator Walsh), indicating the understanding of Congress that the treble damage remedy was available to "any citizen of the United States or denizen of the country who desires to take advantage of it." *Cf.* I FEDERAL TRADE COMMISSION, REPORT ON COOPERATION IN AMERICAN EXPORT TRADE 9 (1916), *quoted* Pet. Br. 34 n.44.

The Department's choice of law theory may or may not possess validity in respect of "persons," as Congress understood that term. But the theory appears to concede that foreign governments were not among those whom Congress sought to protect, and that the principal reason for extending a cause of action to them would be to gain their assistance in protecting our domestic markets. We have already shown that such assistance by foreign governments would not benefit the domestic economy. *See* Pet. Br. 38. If domestic enforcement is the goal, the United States and those under its jurisdiction are fully capable of enforcing the antitrust laws. Indeed, the related litigation furnishes an example of thorough and zealous enforcement by domestic parties.[18]

2. It is Not "Unsound" to Distinguish between Corporations and Sovereign Governments.

In 1890 Congress distinguished sharply between foreign governments and foreign corporations, and it continues to perceive such a distinction, since it has provided in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.

18. The history of proceedings against petitioners for alleged antitrust violations goes back nearly twenty years to the commencement of an action by the Federal Trade Commission in 1958. *See In re American Cyanamid Co.*, 63 F.T.C. 1747 (1963), *vacated and remanded sub nom. American Cyanamid Co.* v. *Federal Trade Commission*, 363 F.2d 757 (6th Cir. 1966), *In re American Cyanamid Co.*, 72 F.T.C. 623 (1967), *aff'd sub nom. Charles Pfizer & Co.* v. *Federal Trade Commission*, 401 F.2d 574 (6th Cir.), *cert. denied*, 394 U.S. 920 (1968). The Department of Justice brought a criminal action in 1961 against three of the petitioners on the basis of the same allegations which it summarizes, Gov. Mem. II 2, and after extended litigation those petitioners were acquitted on the merits. *See United States* v. *Chas. Pfizer & Co.*, 367 F. Supp. 91 (S.D.N.Y. 1973). A total of 166 separate damage actions were filed. Suits by foreign governments were among the last to be filed, after a large number of the cases had been disposed of by settlement. In the only one of the damage cases which has been tried to a conclusion, petitioners prevailed on the merits. *See North Carolina* v. *Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd*, 537 F.2d 67 (4th Cir.), *cert. denied*, 429 U.S. 870 (1976). For the history of the litigation, see *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 741-42 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

§§ 1602-1611 (1976), that foreign sovereigns may not be held liable for punitive damages, even in connection with commercial activities, although their "agency or instrumentality" (defined as "a separate legal person, corporate or otherwise") may be so liable. *See id.* §§ 1603(b)(1), 1606; Pet. Br. 33.[19]

Contrary to respondents' assertion (Resp. Br. 18), it is sound and reasonable to distinguish between sovereign foreign governments and other parties who are more fully subjected to the authority of Congress. Congress included foreign corporations in the definition of "person" because it was aware that they sometimes engaged in anticompetitive activities in the United States, and it wished to give them both the benefits and the burdens of our law. *See* Pet. Br. 22. Thus, a foreign government-owned corporation is subject to the antitrust laws. *See United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), and cases cited, Pet. Br. 32. Such a corporation may also sue for treble damages. *See United States and Tennessee Valley Authority* v. *General Electric Co.*, 209 F. Supp. 197, 203-05 (E.D. Pa. 1962). In contrast to government-owned corporations, sovereign governments themselves possess an immunity—full or partial—from liability for treble damages.[20] The decision to deny foreign govern-

19. A similar distinction has been proposed by the Federal Trade Commission, with the concurrence of the Justice Department, under a provision of the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. § 18a (1976). *See* Pet. Br. 32 & n.39. In the same act, Congress also granted special enforcement powers to the States, but not to foreign governments. *See* 15 U.S.C. § 15c. *See* Pet. Br. 37-38 & n.49.

20. *See* Pet. Br. 33 n.41. Certainly foreign governments are not "persons" on whom the criminal penalties of sections 1 and 2 of the Sherman Act may be imposed. Although private parties who conspire with foreign governments may be liable for damages, it appears that Congress did not seek to impose antitrust liability upon sovereign governments themselves. *See Parker* v. *Brown*, 317 U.S. 341, 351 (1943); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona*, 97 S. Ct. 2691 (1977). In 1890 Congress regarded sovereign immunity as a principle of international law (*see The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), just as it believed that it lacked power under the Constitution to punish municipalities. *See Moor* v. *County of Alameda*, 411 U.S. 693, 708-10 (1973). "[I]n interpreting the statute it is not our task to consider whether Congress was mistaken . . . in its view of the limits of its power . . .; rather, we must construe the statute in light of the impressions under which Congress did in fact act." 411 U.S. at 709. Congress left it to the Judiciary to define the scope of interstate commerce under the Constitution, but it regarded other terms and features of the law as settled. *See* Pet. Br. 23 & n.29.

ments the corresponding cause of action under our law was not unfair or discriminatory. Rather, it reflected the view that the United States need not seek to regulate the relationships between foreign governments and their suppliers to the same extent that it regulates the relationships of private parties under its jurisdiction. *Cf. National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

Foreign governments will not be able to circumvent Congress's definition of "person" by dubbing their various ministries "corporations." If a particular government corporation has no independent existence and is but a governmental department, very likely it is not what Congress had in mind when it provided that "corporations" should be deemed to be persons.[21]

21. A number of cases have held that a statewide government agency, though organized in corporate form, must be regarded as the State itself for purposes of the diversity jurisdiction, 28 U.S.C. § 1332(c). *E.g., State Highway Commission* v. *Utah Construction Co.*, 278 U.S. 194 (1929). But incorporated agencies which have interests distinct from those of the State—because they represent local groups, for example—are held to be separate corporate persons for purposes of the diversity jurisdiction. *E.g., Moor* v. *County of Alameda*, 411 U.S. 693 (1973). Amicus West Germany insists that it is both a sovereign nation and a "corporation" organized under its own law. Ger. Br. 2-3. But when Congress excluded foreign governments from the definition of "person," it established two mutually exclusive categories. West Germany cannot obtain the privileges of "personhood" under the regulation of Congress while it also retains sovereign power to regulate international trade in a manner inconsistent with the regulation of Congress. *See United States* v. *Cooper Corp.*, 312 U.S. 600, 607 (1941) ("We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws . . . seems so strained as not to merit serious consideration").

3. Foreign Governments Are Not Helpless Victims of Restraints of Trade; In the Field of International Commerce They Have "Public Enforcement Powers" at Least as Broad as Those of the United States.

The Department of Justice asserts that the ground of decision in *Georgia* v. *Evans* was that the States of the Union lacked "the public enforcement powers of the United States." Gov. Mem. II 5. If so, that decision is clearly inapplicable to foreign governments. While the States have ceded to Congress their powers over interstate trade, foreign governments retain sovereign power, and their jurisdiction over international trade is as broad as that of the United States. Thus, a decision that a foreign government may obtain treble damages in our courts would leave it free to exercise its "public enforcement powers" in its own courts in respect of the same alleged restraints. Unlike a State, it could impose cumulative sanctions on the wrongdoer. And it could enforce policies which conflict with those of the antitrust laws.[22]

Amicus West Germany suggests here that it may be "totally without remedies" under its own law. Ger. Br. 11 n.17. But West Germany's public enforcement powers under its own antitrust law include injunction, fines, price rollbacks and even establishment of a maximum price.[23]

22. For evidence that foreign economic policies may conflict with our own, *see, e.g., Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972); *International Refining Corp.* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970); *United States* v. *Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955); *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, 2 All Eng. Rep. 780 (C.A. 1952).

23. *See* Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] ("GWB"), Law of July 27, 1957, [1957] Bundesgesetzblatt [BGBl] I 1081, as amended by Law of Aug. 3, 1973, Bundesgesetzblatt [BGBl] I 917 (W. Ger.). *See especially id.* § 37(a) (injunctive order); §§ 38, 39 (fines). Fines may be fixed as high as three times the profits realized as a result of an illegal trade practice. GWB § 38(4). *See* Markert, *Recent Developments in German Antitrust Law*, 43 FORDHAM L. Rev. 697, 707 (1975). As to price rollbacks and establishment of a maximum price, see Judgment of July 3, 1976, 67 BGHZ 104 (W. Ger. Sup. Civ. Ct.) (Merck case) (summarized in COMM. MKT. REP. (CCH) ¶ 30,905). *See also* Judgment of Dec. 16, 1976 (W. Ger. Sup. Civ. Ct.) (Hoffman-La Roche case) (summarized in COMM. MKT. REP. (CCH) ¶ 30,933). The German antitrust law also authorizes the filing of private suits for injunction and damages. GWB § 35.

The Federal Republic is further protected by the antitrust provisions of the Common Market's Treaty of Rome.[24]

It is significant that on the day certiorari was granted in these cases, the German Federal Cartel Office exercised its public enforcement powers by serving a demand letter upon petitioner Pfizer's German subsidiary advising that the Office had commenced a proceeding under the German antitrust law. The letter alleges that the Pfizer subsidiary has a "market dominating position" in connection with its broad spectrum antibiotic products and that such position has been reflected in its market prices. The proceedings which are now in progress in Germany concern some of the very drugs which are the subject of West Germany's treble damage action in the United States, and the charges there parallel those of the complaint here.[25]

The Philippines and India also possess antitrust legislation.[26]

Nor can respondents fairly contend that their legislation is "ineffective in securing jurisdiction over individuals in the United States who are responsible for the injury."

24. Articles 85-99 of the Treaty Establishing the European Economic Community, March 25, 1957, 294 U.N.T.S. 2. Another treaty also assures West Germany the assistance of the Department of Justice in the enforcement of the German antitrust law against American businesses. *See* Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, June 23, 1976, United States-Federal Republic of Germany, [1976] 27 U.S.T. 1956, T.I.A.S. No. 8291.

25. *See* complaint in *Federal Republic of Germany* v. *Pfizer Inc.* (D. Minn. No. 4-74-614). For the convenience of the Court a copy of the West German demand letter and an English translation have been lodged with the Clerk of the Court.

26. PHILIPPINES REV. PENAL CODE, art. 186 (1972); India Monopolies and Restrictive Trade Practices Act, 1969, 14 INDIA A.I.R. MANUAL 657 (1972). For an example of further economic regulation by India, see Foreign Exchange Regulation Act, 1973, [1973] A.I.R. (INDIAN ACTS) 183, under which India is seeking to require IBM and Coca-Cola to divest themselves of majority ownership of Indian subsidiaries. *See* N.Y. Times, Oct. 1, 1977, at 25, col. 4.

Resp. Br. 5. Foreign courts can and do apply principles like those of *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), in order to restrain conduct outside their borders which has an impact within.[27] Indeed, American firms with no office in the Common Market countries have already been prosecuted under antitrust provisions of the Treaty of Rome.[28] As long as the American defendant has sufficient contacts with the foreign country to satisfy "traditional notions of fair play and substantial justice," the exercise of jurisdiction by the foreign country would not conflict with due process or international law. *See International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945); *The S. S. Lotus*, [1927] P.C.I.J., ser. A, No. 10; Mann, *The Doctrine of Jurisdiction in International Law*, 3 HAGUE ACADEMY RECUEIL DES COURS 1, 13 (1964).[29]

27. *See, e.g.*, GWB § 98(2), which makes the German antitrust law applicable to all restraints "which have effects in the territory in which this Act applies, even if they result from acts done outside the territory."

28. *See, e.g., Europemballage Corp. and Continental Can Co.* v. *Commission of the European Communities*, [1973] E. Comm. Ct. J. Rep. 215, 242, 12 Comm. Mkt. L. R. 199, 222 (1973).

> Community law is applicable to . . . an acquisition which, influences market conditions within the Community. The circumstance that [the American company] does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community Law. [1973] E. Comm. Ct. J. Rep. 242.

See also Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp. v. *Commission of the European Communities*, [1974] E. Comm. Ct. J. Rep. 223, 13 Comm. Mkt. L. R. 309 (1974).

29. In the instant cases, respondents allege that the petitioning pharmaceutical companies do business around the world, including Iran, the Philippines and India. A 15-16, 75-76, 108-110. The record also indicates that petitioners hold patents under German, Indian and Philippine law. A 144-46. Although United States courts would not enforce foreign administrative sanctions or punitive judgments (*see Huntington* v. *Attrill*, 146 U.S. 657 (1892)), our courts might indeed enforce a compensatory judgment, either under principles of comity (*see Hilton* v. *Guyot*, 159 U.S. 113, 205-06 (1895)); *British Midland Airways Ltd.* v. *International Travel, Inc.*, 497 F.2d 869 (9th Cir. 1974)) or under the Uniform Foreign Money Judgments Recognition Act. *See, e.g.*, ILL. REV. STAT. ch. 77, §§ 121-129 (1973); MASS. GEN. LAWS ANN. ch. 235, § 23A (West Supp. 1977); N.Y. CIV. PRAC. LAW §§ 5301-5309 (McKinney Supp. 1976).

Contrary to respondents' assertion, foreign governments can obtain evidence from United States concerns by subpoena, or by letters rogatory. FED. R. CIV. P. 28(b). Moreover, the Attorney General has recently expressed eagerness to assist other governments in the prosecution of their antitrust laws, at the same time deploring the fact that a number of those governments have purposefully enacted "'blocking' legislation solely to frustrate U.S. antitrust laws . . . ." *See* Address by Attorney General Bell, American Bar Association Assembly Luncheon 2, 6 (Aug. 8, 1977), *reprinted in* [1977] 155 DAILY REP. FOR EXECUTIVES (BNA) at B-1, B-2.

Even without a cause of action for treble damages, foreign governments which deal with American businesses benefit from our antitrust laws and their enforcement by the United States and private persons. Perhaps no other country in the world has gone so far to enforce the principles of free competition and, indirectly, to extend the benefits of such competition to foreign nations, many of which seek to restrain their own trade in order to impose high prices on American consumers.

Conclusion

There is no evidence whatever that Congress wished to authorize treble damage suits by foreign governments. It legislated in terms which it understood to preclude such a result. At a time when some of the world's foreign governments have combined to extract a maximum from our domestic economy, the Judicial Branch should not undertake to extend the treble damage provision of our antitrust laws for the benefit of such governments. If a magnanimous gesture is called for, it should be made by Congress.

Accordingly, for the reasons set forth above and in our principal brief, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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October 19, 1977

FOR ARGUMENT

No. 76-749

In the Supreme Court of the United States

OCTOBER TERM, 1977

PFIZER INC., ET AL., PETITIONERS

v.

THE GOVERNMENT OF INDIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

Page

Cases—continued:

Page

Cases—continued:

Page

Cases—continued:

Statutes:

Miscellaneous:

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In response to the Court's order of January 25, 1977, the Solicitor General set forth the views of the United States at the time this case was pending on petition for a writ of certiorari. We adhere to the views in that memorandum, but set forth below some additional considerations in response to the arguments of petitioners.

1. Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 15, provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages. Section 1 of the Act, 38 Stat. 730, 15 U.S.C. 12, provides that "[t]he word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

Respondents filed complaints alleging in substance that petitioners had engaged in an unlawful combination and conspiracy to restrain interstate and foreign trade and commerce in the manufacture and sale of broad spectrum antibiotics and related products, and had conspired to monopolize, attempted to monopolize, and monopolized this trade and commerce, in violation of Sections 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 and 2. The alleged violations were said to have been committed through an agreement confining the manufacture of and sale of tetracycline to the petitioners, restricting the sale of bulk tetracycline within the United States and abroad, and selling within the United States and abroad at substantially identical and non-competitive prices. It was further alleged that petitioner Pfizer had launched the violations by defrauding the United States Patent Office in order to obtain a monopoly of tetracycline. (App. A-28 to A-33, A-86 to A-91, A-121 to A-126.)

The complaints stated that petitioners' managements within the United States had controlled, reviewed and approved their companies' restrictive policies and agreements; and that substantial quantities of the product involved had been manufactured in the United States for shipment abroad, although some may have been manufactured abroad by petitioners' licensees or subsidiaries. Finally, each respondent alleged that it had been injured in its business or property by the violations in an undetermined amount, and sought appropriate relief. (App. A-25 to A-26, A-38 to A-40, A-82 to A-83, A-96 to A-97, A-117 to A-119, A-131 to A-132.)

Section 4 does not limit the right to sue to United States citizens or residents, but broadly gives it to "[a]ny person," and Section 1 includes foreign corporations within the definition of "person." If the foregoing allegations had

been made by a foreign businessman or foreign corporation, the plaintiff's capacity to sue would be undisputable.[1]

Accepting, as we must, respondents' allegations, the question is whether a plaintiff claiming to have been injured by a price-fixing-and-monopolization conspiracy that restrained trade both within and outside the United States, is foreclosed from suit solely because it is a foreign government rather than a foreign citizen or a foreign corporation.[2]

2. Congress adopted the antitrust laws primarily to protect American consumers and American entrepreneurs from the pernicious effects of restraints of trade in "commerce." But it defined commerce to include not only that "among the several States," but also with "foreign nations." 15 U.S.C. 1, 2, 3, 12. Moreover, in defining "persons" in Section 1 of the Clayton Act, Congress did not restrict the right to sue to citizens or residents of the United States, or to domestic corporations. In giving corporations the right to sue, Congress expressly included

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[1] For examples of cases in which foreign plaintiffs were permitted to maintain suits in similar circumstances, see *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc.*, 375 F. Supp. 610 (E.D. Pa.), modified in part, 383 F. Supp. 586; *Industria Siciliana Asfalti Bitumi, S.p.A. v. Exxon Research and Engineering Co.*, 1977-1 Trade Cases para. 61,256 (S.D. N.Y.). Cf. *Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance*, 451 F. 2d 727 (C.A. 2).

If a respondent government had operated through a corporate instrumentality organized under its own laws and wholly owned or controlled by it, that instrumentality also would be entitled to sue. Cf. *Amtorg Trading Corp. v. United States*, 71 F. 2d 524 (C.C.P.A.).

[2] Such actions, of course, must meet the statutory requirement that the plaintiff allege and prove injury to its business or property. Cf. *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251; *Illinois Brick Co. v. Illinois*, No. 76-404, decided June 9, 1977; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477. The complaints here so allege (App. A-38 to A-39, A-96, A-131).

"corporations * * * existing under * * * the laws of any foreign country." 15 U.S.C. 12. Congress thus concluded that protection of the interstate and foreign commerce of the United States required that antitrust remedies be available to foreign plaintiffs.

The treble damage remedy was provided for "any person" injured by "any violation of the antitrust laws," again without limiting such persons to American citizens or residents. That remedy is intended not only to provide compensation to the victim of antitrust violations (see, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-266; *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 139), but also to provide "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc.*, *supra*, 392 U.S. at 139. See, *e.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236; *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131; *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318; *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-660; *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642, 648.

Notwithstanding these purposes, *United States* v. *Cooper Corp.*, 312 U.S. 600, held that the United States was not a "person" entitled to sue for treble damages under the definition of "person" in former Section 7 of the Sherman Act, 26 Stat. 210, which was similar to that in Section 1 of the Clayton Act.[3] The reason for that decision, the Court

[3]Section 7 was repealed in 1955 on the ground that it was redundant. 69 Stat. 283.

explained shortly after in *Georgia* v. *Evans*, 316 U.S. 159, 161, was that Congress had provided the United States with an array of public remedies and sanctions not available to others who might be injured by antitrust violations. Speaking only of the United States, the Court in *Cooper* had noted that "[s]ince, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."[4] 312 U.S. at 604-605. It emphasized, however, that "there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by use of the term, to bring state or nation within the scope of the law. * * * Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction." 312 U.S. at 604-605.

Applying these principles in *Georgia* v. *Evans*, the Court held that the State of Georgia was a "person" entitled to sue for treble damages, on the ground that it lacked the public enforcement powers of the United States and thus had no remedies for violation of the Sherman Act except the private action. The Court pointed out that

[4]The court cited *In the Matter of the Will of Fox*, 52 N.Y. 530, affirmed *sub nom. United States* v. *Fox*, 94 U.S. 315. *Fox* held that the United States was not a "person" under the New York Statute of Wills, defining persons to whom real property could be devised. The Court apparently followed the interpretation by the New York Court of Appeals of the state's statute. 94 U.S. at 320. But in another New York case, *The Republic of Honduras* v. *Soto*, 112 N.Y. 310, 311-312, 19 N.E. 845, 846, decided after *Fox* and less than two years before the passage of the Sherman Act, the New York Court of Appeals held that a foreign government was a "person" under the New York Code of Civil Procedure because it was "a legal entity capable of acquiring and enjoying property and protecting itself from injuries thereto in the courts of foreign countries * * *."

Cooper had not ruled "that the word 'person' abstractly considered, could not include a governmental body." 316 U.S. at 161. Indeed, it noted that the Court had already held that a municipality was a person entitled to sue for damages under the Sherman Act (*Chattanooga Foundry* v. *Atlanta*, 203 U.S. 390), and that it would therefore be unreasonable to infer that Congress intended to define "person" so restrictively as to exclude a State simply because it is a State. 316 U.S. at 162-163.

Since the exclusion of political bodies from the definition of "person" in the antitrust laws would have been inconsistent with the right of states and municipalities to sue that was recognized in *Chattanooga Foundry* v. *Atlanta*, *supra*, and *Georgia* v. *Evans*, *supra*, those cases demonstrate that the absence of any reference to political entities in the definition of "person" in Section 1 does not evidence an intent to exclude them.[5]

3. This conclusion is consistent with general rules of statutory construction. Section 1 of the Clayton Act provides that "person" is "deemed to include corporations and associations * * *." In common usage, "includes" is an illustrative term, analogous to "comprehends" or "embraces." It therefore "imports a general class, some of whose particular instances are those specified in the definition" (*Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125

[5]Petitioners make an elaborate argument that *Evans* was based on considerations of federalism invoked in the brief of the State of Georgia, and as such "should be regarded as an exception to the more general rule as to sovereign governments which this Court had applied in the *Cooper* case" (Pet. Jt. Br. 27). In *Cooper*, however, the Court stated that there was "no hard and fast rule of exclusion" (312 U.S. at 604-605), and there is nothing in *Evans* to show that the decision turned upon considerations of federalism.

n. 1), and does not imply a limitation.[6] Thus, numerous cases have construed the term "person" in federal statutes to cover governmental entities, despite the absence of any express reference to such entities in the statute.[7]

Foreign governmental entities come within this rule. Long before the Sherman Act it was established that foreign sovereigns may sue in the courts of the United States to the same extent as a domestic corporation or individual.[8] *The Sapphire*, 11 Wall. 164, 167-168; cf.

[6]Had Congress intended those two categories to be exclusive, it presumably would have used the word "means," as it did elsewhere in Section 1: "'Commerce' * * * means trade or commerce among the several States * * *." See *Helvering* v. *Morgan's, Inc.*, *supra*.

[7]See, *e.g.*, *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (revenue statutes); *California* v. *United States*, 320 U.S. 577, 585-586 (Shipping Act); *National Labor Relations Board* v. *Local Union No. 313, IBEW*, 254 F. 2d 221, 224 (C.A. 3) (National Labor Relations Act); *Burke* v. *Railroad Retirement Board*, 165 F. 2d 24 (C.A.D.C.) (Railroad Retirement Act); *Ruhl* v. *Railroad Retirement Board*, 342 F. 2d 662, 664-666 (C.A. 7), certiorari denied, 382 U.S. 836 (Railroad Retirement Act); *The Mercer County Improvement Authority*, 109 MCC 795, 798 (Interstate Commerce Act).

[8]This principle is firmly embedded in English law. The English Statute of Monopolies of 1623, 21 Jac. 1, c. 3, declared certain monopolies void and, in Section 4, gave the right to sue for treble damages to "any pson [person]" (without limitation) who was aggrieved. A number of nineteenth century English cases established that foreign sovereigns, including the United States, had the same standing to sue in English courts as a domestic plaintiff. *Hullet & Co.* v. *The King of Spain*, 6 Eng. Rep. 488 (Lords); *The King of Two Sicilies* v. *Willcox*, 61 Eng. Rep. 116, 129 (V.C.); *United States of America* v. *Wagner*, L.R. 2 Ch. 582; *The Emperor of Austria* v. *Day and Kossuth*, 45 Eng. Rep. 861 (Ch. App.). Floor debate on the Sherman Act indicated that it was the intention of Congress to incorporate in the Act English common law principles with respect to monopolies and unfair competition. See, for example, the remarks of Senator Hoar, a member of the Judiciary Committee that drafted the version of the bill as it finally passed Congress, and of Senator Sherman (21 Cong. Rec. 2456, 2459, 2460, 3146, 3152 (1890)).

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Indeed, prior to the Clayton Act foreign governments, acting in their private and proprietary capacities, had brought unfair competition suits in American courts against United States companies. *French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427; *La Republique Francaise* v. *Schultz*, 94 Fed. 500 (S.D. N.Y.); *City of Carlsbad* v. *Kutnow*, 68 Fed. 794 (S.D. N.Y.); *City of Carlsbad* v. *Schultz*, 78 Fed. 469 (S.D. N.Y.). And the right of a foreign state to sue under a federal statute that did not include foreign states in its enumeration of eligible plaintiffs was recognized in *Swiss Confederation* v. *United States*, 70 F. Supp. 235, 236-237 (Ct. Cl.), certiorari denied, 332 U.S. 815. See also *Lehigh Valley R. Co.* v. *State of Russia*, 21 F. 2d 396, 399 (C.A. 2), certiorari denied, 275 U.S. 571.

Petitioners nevertheless contend (Pet. Jt. Br. 19-20) that the general definition of "person" in R.S. 1 (1873-1874)[9] shows that Congress intended to define "person" in the Sherman Act so as to exclude "political bodies." They refer to the concern of the Commissioners initially hired by Congress to codify federal statutes,[10] that inclusion of political bodies in the definition of "person" would either be redundant of the term "corporation," or so broad as to require that subsequent statutes using the term "person" affirmatively exclude states, territories and foreign governments from the definition of that term (see Pet. Jt. Br. 19, n.

[9]R.S. 1 (1873-1874) provides:

> The word "person" may extend and be applied to partnerships and corporations * * *.

[10]Much of the Commission's work was redone. See Dwan and Feidler, *The Federal Statutes—Their History and Use*, 22 Minn. L. Rev. 1008, 1013 (1938).

22). Although Congress did not include political bodies in R.S. 1's definition of "person," this omission does not show that this definition affirmatively excludes such bodies. Rather, the definition, now codified in 1 U.S.C. 1,[11] was phrased in illustrative words of inclusion that permit governmental bodies, foreign and domestic, to be treated as "persons" according to the context and purpose of the statute (see discussion *supra*, p. 5). Thus, even assuming that in the Sherman and Clayton Acts Congress adopted the definition of "person" in R.S. 1, that would not evidence a purpose to exclude political bodies, as *Evans*, *Chattanooga Foundry*, and the cases discussed above show.

4. It may be argued that it would be anomalous to treat a foreign government as a "person" entitled to sue for treble damages, while denying the United States the same right. This situation is no more anomalous, however, than permitting states and their subdivisions, but not the United States, to sue. Moreover, there is no true anomaly. The different treatment to be given the United States and foreign governments reflects a basic difference between the relationship of the United States and of foreign governments to the courts of the United States.

The United States as sovereign may legislatively select the remedies by which it will enforce its laws and define its rights in its own courts. The rationale of *Cooper* was that because Congress had given the United States other remedies for enforcing the antitrust laws, it did not intend the government also to be able to sue for treble damages. See *Georgia* v. *Evans*, *supra*, 316 U.S. at 161. A government

[11]1 U.S.C. 1 provides:

> [T]he words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals; * * *.

litigating in the courts of a foreign nation, however, stands on the same footing as any other litigant and has no control over its access to that country's courts. See, *e.g.*, *The Sapphire*, 11 Wall. 164, 167-168; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 408-412; *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134-135, n. 2. Thus a foreign government is more like an individual, a corporation, or a domestic political body under the rationale of *Evans* than like the United States as sovereign under *Cooper*.

Indeed, denying foreign governments the right to sue for damages they have suffered as a result of a conspiracy by American firms to restrain and monopolize the foreign commerce of the United States would be inconsistent with the application of the antitrust laws to that commerce. It also would be inconsistent with statutes such as the Webb-Pomerene Act, 40 Stat. 516, as amended, 15 U.S.C. 61-65, which carefully specify the limited circumstances under which American firms may engage in collective activity in export trade that would otherwise violate the Sherman Act, so long as such activity does not restrain trade within the United States or restrain the export trade of nonparticipating competitors. 15 U.S.C. 62; See *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199.

It may also be argued (see Pet. 10-11) that it also would be anomalous to permit a foreign sovereign that restrains or restricts United States firms to sue those firms under the antitrust laws for damages it has suffered as a result of their collective retaliatory action. That is not this case. Nothing in United States law, however, authorizes American firms to resort to such self help. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467-468. If any action is to be taken with respect to acts of foreign

sovereigns hostile to United States firms, that is a matter for the United States government; the victims cannot respond by committing antitrust violations against the foreign government involved.

5. It is not significant that foreign governments have not brought treble damage suits in the past. In the early years of this century, foreign governments rarely engaged in ordinary commercial activity. See, *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 700-701, n. 14 (opinion of White, J.). There was little occasion, therefore, for them to be exposed to injury from antitrust violations. This has changed, however: "Participation by foreign sovereigns in the international commercial market has increased substantially in recent years. Cf. International Economic Report of the President 56 (1975)" (*id.* at 703; opinion of White, J.).

When foreign governments acting in their commercial capacity enter the courts of the United States, they stand on the same footing—and have the same burdens and disabilities—as any domestic litigant. See *Alfred Dunhill of London, Inc., supra*; cf. the Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891 (foreign governments and their instrumentalities engaging in commercial activity in or directly affecting the United States have no sovereign immunity). They should not have the additional disability of being precluded from the antitrust recoveries that all other commercial entities may obtain in the United States courts.[12]

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[12]Petitioners quote (Pet. Jt. Br. 11) the statement in a recent speech by the Assistant Chief of the Foreign Commerce Section of the Antitrust Division that there is no evidence that the Sherman Act was intended "for the benefit of foreign persons in foreign markets, to hold to account United States exporters engaged in restrictive practices in those markets." The statement, however, was made in discussing a different issue from that in the present case. The speaker was considering the

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 1977.

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hypothetical case of American firms whose restrictive practices were directed solely against a foreign firm and whose impact was felt solely in the foreign markets in which that firm operated, and which did not affect the foreign or domestic commerce of the United States.

The speaker's conclusion that in that hypothetical situation there would be no violation of the antitrust laws does not cover the present case, in which the conspiracy is alleged to have adversely affected the foreign and domestic commerce of the United States (see *supra*, p. 2). Indeed, the speaker specifically referred to the present case and stated (speech, p. 6) that there "the Eighth Circuit held, properly we think, that a foreign government has standing to sue as a person under the Sherman Act." For the convenience of the Court, copies of the speech have been lodged with the Clerk of the Court.

Although there has been considerable law review discussion of the standing of foreign governments to sue for treble damages for violations of the antitrust laws, none of these comments has suggested that a foreign government damaged by a conspiracy against the foreign and domestic commerce of the United States may not sue. See, *e.g.*, Note, *The Capacity of a Foreign Government to Bring an Action for Treble Damages Under the Federal Antitrust Laws*, 44 Geo. Wash. L. Rev. 287 (1976); Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions*, 9 Cornell Int. L. J. 137 (1975); Note, *Foreign Nation Has Standing to Sue for Treble Damages*, 5 V and J. Trans. L. 531 (1972).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

vs.

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF VIETNAM, and THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES,
Respondents.

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*

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TABLE OF CONTENTS

CITATIONS

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Respondents.

MOTION OF THE FEDERAL REPUBLIC OF GERMANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, the Federal Republic of Germany hereby respectfully moves for leave of the Court to file the Brief annexed hereto as *amicus curiae* in this case.*

* Petitioners have refused consent to the filing of a brief *amicus curiae* by the Federal Republic of Germany. That refusal is reflected in a letter dated July 6, 1977, to Paul C. Sprenger, attorney for the Federal Republic of Germany, from Peter Dorsey, attorney for American Cyanamid Company, on behalf of petitioners.

The interest of the Federal Republic of Germany derives from its own substantial commercial activity in United States foreign commerce and from its role as a plaintiff in a coordinated *Antibiotic Antitrust Action* pending in the District of Minnesota. *Federal Republic of Germany, et al. v. Pfizer Inc., et al.*, D. Minn. Civil No. 4-74-614. The complaint in that action, also brought under Section 4 of the Clayton Act, 15 U.S.C. §15, contains allegations of injury sustained by the Federal Republic of Germany in its purchases of broad spectrum antibiotics as a result of conspiracy in restraint of trade and monopolization by petitioners violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2.

As a corporation under West German law, the Federal Republic of Germany will remain within the Clayton Act definition of "person" (15 U.S.C. §12) irrespective of the disposition of the question now before the Court as to whether "person" in Section 4 includes foreign nations generally. On December 27, 1975, upon denial of petitioners' motions to dismiss for lack of standing in cases now before this Court, the District Court observed with respect to the action which had been filed by German plaintiffs about a year earlier:

> "The parties (including defendant-petitioners) have indicated that special considerations may apply to the *Germany* case and thus defendants' motion to dismiss is not yet ready for decision." *Miscellaneous Order No. 75-49*, reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at E-4.

As a corporation and as a member of the European Economic Community having an active interest in antitrust enforcement, the Federal Republic of Germany possesses a status and perspective which permit it to present to the Court addi-

tional considerations bearing on the question here presented, including those relating to treaty obligations and to the inconsistent international application of the antitrust laws that would result from adoption of the exception to the scope of Section 4 of the Clayton Act which is being urged by petitioners. In this respect, the Federal Republic of Germany occupies a position unique and apart from that of the parties before the Court. This causes the Federal Republic to believe that its status, its treaty relationship with the United States, and attendant implications for the issue now before the Court will not be adequately presented by other parties. The future reciprocal remedies available to American and German entities under their respective antitrust laws are of manifest significance and importance to both nations and are directly relevant to the full consideration of the issue here presented. Further, the question to be reviewed involves a current and important area of antitrust law which is of substantial interest and concern to *amicus* as a litigant, as a foreign nation which in its proprietary capacity engages in United States foreign commerce, and as a nation which shares the antitrust philosophy of the United States. See, e.g., "Agreement Between the Government of the United States of America and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive Business Practices", T.I.A.S. No. 8291, September 11, 1976, unofficially reported in CCH Trade Reg. Reptr. ¶50,283.

WHEREFORE, the Federal Republic of Germany requests the opportunity to express its views and accordingly respectfully requests that the Court grant this motion for leave to

file the annexed Brief of the Federal Republic of Germany as *Amicus Curiae*.

Respectfully submitted,

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Respondents.

BRIEF OF THE FEDERAL REPUBLIC OF GERMANY AS *AMICUS CURIAE*

THE QUESTION PRESENTED FOR REVIEW

Is a foreign nation a "person" within the meaning of that term as used in Section 4 of the Clayton Act, 15 U.S.C. § 15 (1970)?

ARGUMENT

I. ADOPTION OF THE EXCEPTION URGED BY PETITIONERS WOULD RESULT IN ILLOGICAL APPLICATION OF THE ANTITRUST LAWS BECAUSE, *INTER ALIA*, THE FEDERAL REPUBLIC OF GERMANY IS A FOREIGN CORPORATION UNDER SECTION 1 OF THE CLAYTON ACT.

In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the United States asserted that it could be regarded as a corporation organized under its own laws and that it, therefore, was entitled to sue for antitrust damages as a consequence of that status. The Court disposed of that assertion in short shrift:

> "We may say in passing that the argument that the United States may be treated as a corporation organized under its own laws, that is, under the Constitution as the fundamental law, seems so strained as not to merit serious consideration." 312 U.S. at 607.

Whatever the merits of that argument as it related to the United States,[1] a similar contention made by the Federal Republic of Germany cannot, however, be lightly regarded.

The Federal Republic of Germany is a corporation under the laws of the Federal Republic of Germany. This point is not subject to doubt or dispute. Judgment of October 30, 1951,[2] BGHZ I E 3/309; Judgment of March 25, 1952,

[1] The Court's statement on this point in *Cooper* cannot, of course, constitute a finding or conclusion applicable to foreign nations generally or to any individual foreign nation, as neither that issue nor the relevant facts were then before it.

[2] Decisions in German law reports are not identified by the names of the parties.

Counsel for *amicus* will provide supplementary materials concerning any issue of German law or treaty relationships on which the Court may wish additional information.

BGHZ I ZR 109/51; Judgment of February 28, 1952, BGHZ IV ZR 157/50. German legal scholars record the same view. See, e.g., Maunz-Duerig, *Basic Law Commentary*, Art. 19 Abs. III, Anm. 31 ff; Stein-Jonas, *Civil Procedure Code*, §50 II 3, S.316 (1974); Wierzorek, *Civil Procedure Code*, §50, C II, S.352 (Bd. I, Part 1, 1957). As a corporation, the Federal Republic is capable of possessing rights and, under the German Civil Procedure Code, has both capacity to sue and corresponding susceptibility to be sued. Wierzorek, *Civil Procedure Code*, §50, C II, II a, II al (2. aufl., Bd. I, 1975/76), m.w.N.

Thus, the Federal Republic of Germany does not contend that it may be regarded or should be treated as a corporation, but, more simply, that it *is* a corporation under its own law,[3] a status which has been confirmed by official communique of its Ambassador to the District Court. And, as a corporation, the Federal Republic is squarely within the Clayton Act definition of "person" [15 U.S.C. §12 (1970)] and can be excluded from the set of those entitled to sue for damages only through complete disregard of the definitional section or by amendment thereof.[4]

[3] The same was true of the predecessors of the Federal Republic, both with regard to status as a corporation and capacity to sue and be sued. Judgment of October 4, 1880 RGZ IV E2/392; Judgment of March 25, 1889, RGZ IV E23/261 ff; Judgment of May 22, 1900, RGZ III 84/00; Judgment of January 28, 1905, RGZ V E59/400 ff; Judgment of March 15, 1912; RGZ III War. 257; Judgment of July 1, 1915, RGZ IV Warn. 253; Judgment of March 4, 1930, RGZ III JW 31.737-8; Stein-Jonas, *Civil Procedure Code*, §50 II ff.

The present entity was established by the Allied Powers — Russia, Great Britain, France and the United States — in 1949. See generally Zink, *The United States in Germany 1944-1955*, (D. Van Norstrand Co., Princeton) 1957; and Merkl, *The Origin of the West German Republic*, (Oxford University Press, New York) 1963.

[4] Thus, petitioners' belief that "the test of sovereign or corporate status" possesses "the virtue of clarity of application" and is a "sound basis for distinction" superior to the distinction between "commercial" and "governmental" activities is ill-founded. Joint Brief for Petitioners, p. 32.

The construction of Section 4 for which petitioners contend would produce an illogical and incongruous application of the remedial provisions of Section 4 of the Clayton Act to foreign nations. Those which, like the Federal Republic of Germany, are corporations under their own law, will be permitted to attempt to prove the elements of antitrust offenses and to establish resulting damages, while those nations which are not corporations will be foreclosed from attempting those tasks. This Court should be very slow to create, through statutory construction, such an unreasonable and illogical result. See, e.g., *United States v. American Union Transport*, 327 U.S. 437, 451 (1946).

The incongruity of application which would be produced by the decision being sought by petitioners is further exacerbated by the fact that foreign nations, through their governments, own or control many foreign corporations. See, e.g., *Amtorg Trading Corp. v. United States*, 71 F.2d 524, 528-9 (C.C.P.A. 1934). Since the standing of foreign corporations to sue for antitrust damages is indisputable, a decision generally excluding foreign nations from the protection of Section 4 would inevitably lead to questions concerning the point, if any, at which foreign nation ownership or control would disqualify a given corporation as an antitrust litigant.[5] (Complete ownership? 51% ownership? "control" ?) A German example which comes readily to mind is Lufthansa A.G., which, coincidentally, is currently a defendant in antitrust civil and criminal actions being prosecuted by the United States Department of Justice.

[5] If there were to be no such point, a different set of inequities would result as the better-informed foreign nations would begin conducting their international business through the expedient of shelter corporations.

If the determination of the courts below were reversed, the standing of a corporation in one nation might also come into jeopardy because of ownership by *another* nation. American corporations may find themselves disqualified as plaintiffs as a consequence of substantial investments made by other nations. The same applies to corporations outside the United States. For example, respondent Iran recently acquired a 25.01% interest in Krupp G.m.b.H., an industrial corporation in West Germany.[6] That an American or a German corporation in which its own government has no ownership interest may be denied a Clayton Act remedy because of partial or complete ownership by some *other* foreign nation, would constitute a strikingly unreasonable and bizarre application of law. Yet it is precisely this type of inquiry which would quickly follow a reversal of the decision of the courts below.

In contrast to the disarray in application of the law which would be the inevitable fallout of a decision excluding foreign nations from Section 4, an affirmation of their standing to seek recovery of damages resulting from United States antitrust offenses permits continued availability of the remedial provisions of the Clayton Act to all those who have been injured on a sensible and rational basis.

[6] Reported in *The Wall Street Journal*, Thursday, February 17, 1977, p. 8.

II. TO DENY THE FEDERAL REPUBLIC OF GERMANY AN ANTITRUST CIVIL DAMAGE REMEDY WOULD VIOLATE THE PROVISIONS OF ITS TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION WITH THE UNITED STATES.

The Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany[7] establishes:

> "mutual rights and privileges . . . based in general upon the principles of national . . . treatment reciprocally accorded".

Article VI(1) of the Treaty provides that:

> "Nationals and companies of either Party shall be accorded national treatment with respect to *access to the courts of justice* and to administrative tribunals and agencies within the territories of the other Party, *in all degrees of jurisdiction, both in pursuit and in defense of their rights.*[8] It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication." (emphasis added)

[7] 7 U.S.T. 1839, T.I.A.S. No. 3593 (1956).

[8] That antitrust matters were within the contemplation of the draftsmen of the Treaty is clear from a reading of Article XVIII (1), which sets forth the parties' agreement that:

> "business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories."

And, the Treaty defines "companies" to include all corporations without regard to their profit-making capacity or their "governmental" or "business" nature:

> ". . . corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party." Article XXV(5).

Further, the Treaty defines the "national treatment" to be accorded by the courts of the United States as:

> "the treatment accorded therein to the companies created or organized in . . . the United States of America." Article XXV(3).

Presently, in accord with these treaty provisions, the United States and its corporations have been reciprocally accorded "access to the (German) courts" for the purpose of pursuing antitrust claims. Act Against Restraints on Competition (BGBl. I. 1974, 869); *Civil Procedure Code*, ZPO §50(1). The Treaty assures the Federal Republic and other of its corporations of corresponding access to United States courts in pursuit of their antitrust claims.[9]

[9] Where the anticompetitive activity is orchestrated by United States companies from within the United States, jurisdictional and related practical limitations nearly always make illusory the prospects for successful pursuit of a claim under Germany antitrust law in a Germany forum. As is generally the case, legal action must, as a practical matter, be initiated against a defendant where it is found.

Conversely, with respect to the assertion of antitrust defenses, the Treaty makes clear that governmental entities cannot claim immunity from suit or judgment:

> "*No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall,* if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, *claim* or enjoy, either for itself or for its property, *immunity* therein *from* taxation, *suit, execution of judgment or other liability* to which privately owned and controlled enterprises are subject therein." Article XVIII (emphasis added).

Applying the foregoing treaty provisions to the question before the Court, it is clear that the Federal Republic of Germany must be permitted to litigate antitrust claims in United States federal courts. Treaties are the law of the land, and acts of Congress should not be construed to violate international law if any other possible construction remains.[10] *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64,118 (1804); *MacLeod v. United States*, 229 U.S. 416 (1913). Here the "other possible construction" is the one which has the additional virtues of being in accord with the remedial purpose of Section 4 and the entire scheme of related antitrust statutes. It is that construction which was made by the courts below and which should be affirmed by this Court.

[10] Both the United States and the Federal Republic adopt international law as part of the general body of applicable law. *Kansas v. Colorado*, 206 U.S. 46 (1907); *Hilton v. Guyot*, 159 U.S. 113 (1895); *Skiriotes v. State of Florida*, 313 U.S. 69 (1941).

The Basic Law of the Federal Republic of Germany, 1949, Article 25, provides:

> "The general rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory."

III. FOREIGN NATIONS ARE "PERSONS" ENTITLED TO SUE UNDER SECTION 4 OF THE CLAYTON ACT, AS THE COURT OF APPEALS CORRECTLY DETERMINED IN LIGHT OF THE APPLICABLE DECISIONS OF THIS COURT.

Section 4 of the Clayton Act, 15 U.S.C. §15, provides a civil damage remedy to "*any person* who is injured in his business or property by reason of anything forbidden in the antitrust laws". (Emphasis added.) The words "any person" reflect the plain purpose of Congress to confer the remedy upon all those injured by any proscribed anticompetitive act or practice. The language, in keeping with the broad scope of related statutes[11] and the remedial purpose of Section 4, is expressly all-inclusive. Absent convincing evidence that Congress intended the contrary, all juristic persons must be regarded as within its coverage.[12] In only a single instance have special considerations been found to compel the conclusion that a particular entity, the United States government, was outside the scope of Section 4. *United States v. Cooper Corp.*, 312 U.S. 600 (1941).[13] Petitioners in the present case now seek a general exception to the coverage of Section 4 for foreign nations,

[11] See, e.g., the opening phrases of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2. "Language more comprehensive is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

[12] See *Mandeville Island Farms, Inc. v. American Crystal Sugar Company*, 334 U.S. 219, 236 (1948), concerning Section 7 of the Sherman Act, 26 Stat. 210, the predecessor provision of Section 4 of the Clayton Act.

[13] Congress subsequently enacted a separate provision conferring a remedy for actual damages incurred. 15 U.S.C. §15a (1970).

without regard to the commercial nature of their activities or their status under law.[14]

Previous argument of the question before the Court has devoted substantial attention to *United States v. Cooper Corp.*, 312 U.S. 600 (1971) and *Georgia v. Evans*, 316 U.S. 159 (1942). While the two opinions appear at first blush to give rise to conflicting analogies, the decisions are both consistent with one another and with the *en banc* decision of the Eighth Circuit Court of Appeals in this case.

In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Court held that the United States government was not within the term "person" as used in the antitrust laws.[15] Congressional provision of manifold antitrust sanctions and remedies to the United States government exclusively, including capacity to institute criminal prosecutions and obtain injunctions to restrain violations, was found to reflect Congressional intent to exclude the United States government from the class of persons entitled to sue for civil damages. As the sole recipient of a collection of remedial and enforcement armaments, the United States government was intended by Congress to occupy a unique position in the statutory scheme.

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[14] No constitutional question is implied by the issue before the Court, as the jurisdiction of federal courts reaches "all Cases . . . (and) Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects". U.S. Const. Art. III, §2. Neither does the issue suggest an inquiry concerning antitrust jurisdiction. The commerce clause of the Constitution gives Congress vast power to legislate in the field of interstate and foreign commerce, and petitioners acknowledge that "Congress intended the Judiciary to define 'commerce' so as to reflect the full scope of congressional power". Joint Brief for Petitioners, p. 24 n. 29.

[15] Both *Cooper* and *Georgia v. Evans* concerned former Section 7 of the Sherman Act, repealed in 1955, which is found in the opinion of the court below. *Pfizer Inc. v. Government of India*, 550 F.2d 396 at 398, n. 5 (8th Cir. 1976); Pet. App. at B-4.

Close on the heels of *Cooper*, the Court in *Georgia v. Evans*, 316 U.S. 159 (1942), held that the term "person" included the individual states of the United States, although they had not been specifically mentioned in the definitional section of the Act.[16]

The Court emphasized that *Cooper* did not hold "that the word 'person' abstractly considered, could not include a governmental body". 316 U.S. at 161. The Court said:

> The State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. . . . If the State is not a "person" within §8, the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act.[17]
>
> . . . We can perceive no reason for believing that Congress wanted to deprive a State, as purchaser of commodities shipped in interstate commerce, of the civil remedy of treble damages which is available to other purchasers who suffer through violation of the Act. . . . Nothing in the Act, its history, or its policy, could justify so restrictive a construction of the word "person" in §7 as to exclude a State. 316 U.S. at 162-63.

In sum, the considerations which led to the ruling in *Cooper* were entirely lacking in *Georgia v. Evans*. The court, in consequence, found that the State of Georgia was a "person" under the Sherman Act, as there was no indication of a contrary Congressional intent to deprive domestic States of the civil damage remedy.

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[16] The definition of "person" in the Act, 15 U.S.C. §12, makes no reference to governmental entities of any type.

[17] In this regard foreign nations are in a position identical to that of the states. Foreign nations are totally without remedies when the illegal activities in U.S. foreign commerce are conducted within the United States and the defendants are not within the jurisdictional reach of the courts of the purchaser-nation.

Aided by this Court's previous attention to the statutory language and assessments of Congressional intent in both *Cooper* and *Georgia v. Evans*, the Court of Appeals for the Eighth Circuit, sitting *en banc*, concluded in the present case "that Congress intended other bodies politic, such as a foreign government, to enjoy the same right" to sue for damages. Foreign nations were thus properly found to be within the broad sweep of the term "any person" in Section 4 on the basis of an assessment of Congressional intent with respect to an entity (foreign state) which, like that considered in *Georgia v. Evans* (domestic state), had not been separately identified as included among potential plaintiffs in the definitional section of the Clayton Act.

IV. LEGISLATIVE ENVIRONMENTAL FACTORS CONFIRM THE CONCLUSION THAT CONGRESS UNDERSTOOD FOREIGN NATIONS TO BE WITHIN THE CONCEPT "PERSON".

The task of statutory construction presented in this case includes consideration of the legislative environment at the time of enactment of the statute.[18] In making that assessment, this Court has not in the past and should not now restrict its vision to any single source. Lack of express indications in the legislative history itself establishes, *not* an absence of Congressional intent on the issue presented, but simply that *one* of the indices of intent gives no answer.

As this Court observed in both *Cooper* and *Georgia v. Evans*:

[18] *Ohio v. Helvering*, 292 U.S. 360, 370 (1934); *Georgia v. Evans*, 316 U.S. 159, 161 (1942).

> The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. *United States v. Cooper Corp.*, 312 U.S. 600, 604-5 (1941). *Georgia v. Evans*, 316 U.S. 159, 162 (1942).

With the present issue in the foreground, and insufficient guidance in the legislative history, it is helpful to review those other identified indicia of intent.

First, there can be no question concerning the *purpose* of the antitrust laws. They are designed to promote competition in interstate and foreign commerce by preventing anticompetitive acts and practices, by imposing sanctions on violators, and by providing means of redress to the victims of proscribed conduct. Since the statutory scheme leaves no doubt as to Congressional intent that the protection of competition includes commerce "with foreign nations", since redress to victims is a principal purpose of the scheme (and the specific purpose of Section 4), and since foreign nations purchasing commodities in international commerce have been, from the outset, among the potential victims of the practices which the antitrust laws were designed to prevent, it is wholly in accord with statutory purpose to conclude that Congress intended the term "person" in the phrase "any person who shall be injured" to include foreign nations.

Second, the *subject matter* of the antitrust laws is trade and commerce among the states of the United States and with foreign nations. Section 1 of the Sherman Act, 15 U.S.C. §1, prohibits "[e]*very* contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce

among the several States, *or with foreign nations . . .*". (emphasis added) Similarly, Section 2 of the Sherman Act proscribes monopolization of "*any part of* the trade or commerce among the several States, *or with foreign nations . . .*". (emphasis added) The definition of "commerce" in the Clayton Act, which immediately precedes the definition of the term "person", begins: " 'Commerce', as used herein, means trade or commerce among the several States *and with foreign nations . . .* ", (emphasis added) and contains further references to trade with a "foreign nation". 15 U.S.C. §12. It would simply contradict the obvious to suggest that the subject matter of the antitrust laws, and in particular the Clayton Act, does not encompass trade with foreign nations. Consideration of the applicable subject matter thus can only bolster the conclusion that the term "person" includes foreign nations among those granted a Clayton Act remedy.

Third, the *statutory context* described above forecloses any reasonable *in pari materia* reading of the term "person" in Section 4 to exclude foreign nations from those entitled to sue. Only a rigidly mechanical application of the Section 12 definition of "person"—precisely the approach eschewed by the Court in both *Cooper* and *Georgia v. Evans*—would permit the conclusion that foreign nations are not Clayton Act "persons".

It is important to recognize that the Section 12 definition of "person" does not purport to be exclusive. Had Congress intended to present an exhaustive listing of potential plaintiffs, the formulation used in the preceding definition was readily available. Congress did not, however say " 'person' . . . means", preferring " 'person' . . . *shall be deemed to include. . .*". See *Helvering v. Morgan's Inc.*, 293 U.S. 121 (1934).

As the Court of Appeals observed in the present case on the subject of statutory context, in distinguishing the *Cooper* situation in which the separate provisions relating to the United States government supported the conclusion that it was not a "person", "no other provisions of the Act support the contention that Congress intended to exclude foreign nations". 550 F.2d at 399; Pet. App. at B-7.

Fourth, in the broader *context* of enactment of the language at issue, it should be recalled that petitioners acknowledge that Congress was aware, prior to 1914, of judicial decisions recognizing foreign governments as juristic persons,[19] a concept then firmly rooted in American law. *Cotton v. United States*, 52 U.S. (11 How.) 229 (1850); *The Sapphire*, 78 U.S. 164 (1870); and later, *French Republic v. Saratoga Vichy Co.*, 191 U.S. 427 (1903).

Petitioners prefer to claim that such Congressional awareness precipitated a conscious decision to omit foreign governments from an 1874 general statute defining terms. Act of June 22, 1874, 18 Stat., pt. 1, 1092. The argument, however, makes nonsense of *Georgia v. Evans*, 316 U.S. 159 (1942), as it requires the conclusion that Congress also intended to ex-

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[19] "Congress was indeed aware, as respondents suggest (Opp. Br. 8), that our courts had sometimes described governments as 'artificial' persons entitled to vindicate their property rights in court." Petitioners' Joint Reply Brief in Support of Their Petition for a Writ of Certiorari, p. 5.

Petitioners also note that the "authors of the Sherman Act had a wide acquaintance with the precedents of this Court, scores of which were cited in the antitrust debates of 1889-90". Petition for a Writ of Certiorari, p. 14, citing BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS, S. DOC. NO. 147, 57th Cong., 2d Sess. ix-xi (1903).

Petitioners elsewhere state: "As 'veteran teachers and practicers of law,' specially chosen to give the Senate the best legal advice possible, the (Senate Judiciary) Committee were undoubtedly aware that the question had already arisen whether the term 'person' might include governments as well as corporations." Joint Brief for Petitioners, p. 18.

clude domestic States from the term "person" as defined in that statute. Fortunately, this Court has not adopted petitioners' wooden approach, considering instead the full set of legislative environmental factors which may indicate the intent of Congress on the issue presented. Petitioners' narrow view, moreover, would exclude from those entitled to sue all entities not specifically mentioned in both Section 12 of the Clayton Act and the general interpretive statute. This view would eliminate, not only domestic States, but municipalities[20] and state governmental units[21] that have been recognized as proper antitrust plaintiffs in numerous actions brought under Section 4 of the Clayton Act. The general interpretive statute should give the Court no more pause on the question here presented than it gave the Court in its consideration of the issues in *Cooper* and *Georgia v. Evans*.

Finally, no quandary surrounds the *executive interpretation* of the statute. The United States has consistently expressed the view that the term "person" in Section 4 of the Clayton Act properly includes foreign nations. The Executive Branch reading of the statute has been expressed in participation as an *amicus curiae* supporting the position of the foreign nations in the District Court, in the Court of Appeals, and, more recently, in its memorandum requesting denial of the Petition for a Writ of Certiorari.[22]

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[20] *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23 (6th Cir. 1903), aff'd., 203 U.S. 390 (1906).

[21] See, e.g., *Hawaii v. Standard Oil Company of California*, 405 U.S. 251 (1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F.Supp. 484 (N.D. Ill. 1969).

[22] Memorandum for the United States as *Amicus Curiae*—on Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. Supreme Court File No. 76-749; Brief for the United States as *Amicus Curiae*. File Nos. 74-1680 and 76-1064, Court of Appeals for the Eighth Circuit; see also reference to the *amicus* brief filed in *State of Kuwait v. Pfizer Inc., et al.*, 333 F. Supp. 315 (D. Minn. 1971).

A review of the available indicia of Congressional intent, previously identified by this Court as proper aids to construction, compels the conclusion that "person" as used by Congress in Section 4 of the Clayton Act includes foreign nations. Just as domestic states, though not expressly mentioned as *included* in the Section 12 definition of "person", were found to be included with the scope of the same term in Section 4, the legislative environmental factors militate compellingly in favor of the conclusion that Congress intended the term "person" also to include foreign nations among those entitled to sue.

CONCLUSION

Consonant with the remedial purpose of Section 4 of the Clayton Act, the available indicia of Congressional intent, and the previous assessments of Congressional intent made by this Court on related questions in *Cooper* and *Georgia v. Evans*, the courts below correctly determined that the term "person" includes foreign nations among those entitled to seek redress of antitrust injury under the Clayton Act.

To adopt the exception to the protective scope of Section 4 being urged by petitioners would leave foreign nations exposed to potential antitrust liability in their international commercial activities[23] while denying them the complementary remedy. That result portends assymetrical and inconsistent applications of the United States antitrust laws, violative of treaty commitments and otherwise potentially embarrassing to the United States. Foreign nations purchasing goods in international commerce should properly be accorded remedies congruent with those accorded other juristic "persons".

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[23] Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1602, *et seq.*

Finally, standing to sue is not equivalent to entry of judgment. As Clayton Act "persons", foreign nations are no further than the starting blocks. Only if they clear all the hurdles to satisfactory proof of antitrust liability and damages will they will entitled to recovery. Surely to permit foreign nations, having no practicable remedy in their own courts for antitrust violations directed from within the United States, to attempt to establish the elements of a successful antitrust claim in United States courts is preferable to referring them to an unknown variety of retributive measures, such as tariff barriers and withdrawals of business licenses, which in the end may be seriously detrimental to foreign investments and sales of United States enterprises.

For all of the foregoing reasons, the *en banc* decision of the Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,
Petitioners,

—against—

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN and THE REPUBLIC OF THE PHILIPPINES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' OBJECTION TO MOTION OF THE FEDERAL REPUBLIC OF GERMANY TO FILE A BRIEF AS *AMICUS CURIAE*

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August 12, 1977

In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-749

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION and THE UPJOHN COMPANY,

Petitioners,

— against —

THE GOVERNMENT OF INDIA, THE IMPERIAL GOVERNMENT OF IRAN, and THE REPUBLIC OF THE PHILIPPINES,

Respondents.

PETITIONERS' OBJECTION TO MOTION OF THE FEDERAL REPUBLIC OF GERMANY TO FILE A BRIEF AS *AMICUS CURIAE*

Petitioners withheld their consent to the filing of a brief by the Federal Republic of Germany as *amicus curiae* because there was no reason to believe that the parties before the Court, which include India, Iran and the Philippines, would fail to make an adequate presentation of the single question of law raised in these cases. *See* Supreme Court Rule 42(3). A review of the Federal Republic's motion and the brief annexed thereto confirms that the Federal Republic offers no substantial or relevant arguments that have not been presented by the parties.

The Federal Republic asserts as the basis for its motion that it "occupies a position unique and apart from that of the parties before the court." *See* Motion of the Federal Republic of Germany For Leave to File Brief as *Amicus Curiae* at iii. If that should be so, then Germany has nothing to add here.

The argument is made that Germany "will remain within the Clayton Act definition of 'person' (15 U.S.C. § 12) irrespective of the disposition of the question now before the

Court as to whether 'person' in Section 4 includes foreign nations generally." *Id.* at ii. This is said to be because, even if Congress did not intend to confer the cause of action for treble damages upon foreign governments, German law allegedly deems the German government a "corporation." *See* Brief of the Federal Republic of Germany as *Amicus Curiae* (annexed to Motion), Point I. The Federal Republic also contends that even if the antitrust laws did not confer a cause of action upon it, a 1956 treaty did. *See id.*, Point II. While petitioners believe these arguments to be devoid of merit, we would point out that neither is relevant to the question upon which the Court has granted certiorari.

The Federal Republic addresses itself to the question before this Court only in Points III and IV of the brief annexed to its motion. In neither point does it add to the arguments of the parties.

The Federal Republic did not seek to file a brief as *amicus curiae* before the Court of Appeals.

Wherefore, petitioners oppose the motion of the Federal Republic of Germany to file a brief herein as *amicus curiae*.

Respectfully submitted,

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